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Suruhanjaya Sekuriti Malaysia v Chan Soon Huat

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HIGH COURT (KUALA LUMPUR) — SUIT NO 22NCC-150–05 OF 2015
ABU BAKAR JAIS J
23 FEBRUARY 2017

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Securities — Shares — Disposal of shares and warrants — Sale of shares and warrants before prices in Bursa Malaysia fell sharply — Whether there was insider trading — Whether there was insider information — Whether disposal of shares and warrant naturally timely — Burden of proof — Whether case to be proven on balance of probabilities — Whether case civil in nature — Capital Markets and Services Act 2007 ss 188 & 200

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The defendant and three others started a partnership called WCT Earthworks and Building Contractors ('WCT'), which was later incorporated. WCT was converted into a public-limited liability company under the name of WCT Engineering Bhd and listed on the Second Board of Bursa Malaysia Securities Bhd ('Bursa'). The defendant resigned as the director of WCT in 1995. WCT announced to Bursa that Meydan LLC ('Meydan') from Dubai had awarded a contract ('the contract') with a contract sum of RM4.6 billion to a 50:50 joint venture setup by WCT and Arabtec Construction LLC ('Arabtec') ('the JV'). WCT accepted the award of the contract. The contract involved the construction and completion of main building works ('the Racecourse Project'). There were eleven months left in the contract when the then WCT Regional Director ('Leong') was informed of the cancellation of the contract by the representative of Arabtec. WCT announced to Bursa Malaysia that Meydan had issued the cancellation and Bursa announced the same. Trading in WCT's securities were suspended. When trading resumed, the price of WCT shares fell sharply. In the present claim, which was filed under s 188(2) of the Capital Markets and Services Act 2007 ('the CMSA'), the plaintiff submitted that: (a) the defendant had disposed his shares and warrants in WCT whilst in possession of inside information which related to a material non-public information on the cancellation of the Racecourse Project; (b) the disposal was unnaturally timely and took place a day immediately after the inside information came to the knowledge of the directors of WCT and ceased just a day before WCT's announcement of the insider information to Bursa; (c) after almost four years of continuously holding WCT shares and warrants in considerable volume, the defendant suddenly and hastily disposed almost entirely all his WCT shares and warrants in just four days in all four trading accounts under his control; (d) the defendant was not forthcoming about his close relationship with the directors of WCT; and (e) the reasons given by the

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defendant did not stand up to scrutiny as they were unsubstantiated and clearly contrived. In defence, the defendant argued that: (i) the plaintiff could not seek for a declaratory order in a civil suit brought under s 200 of the CMSA to declare that he had committed a criminal offence; (ii) the plaintiff had no locus standi to bring this action under s 200 of the CMSA; (iii) the defendant had not proven that the defendant was in possession of the information relating to the cancellation of the contract; (iv) although the proceedings was civil, criminal standard applied; (v) it was not pleaded that the instant suit was brought by the plaintiff to claim for damages; (vi) the plaintiff failed to establish that the market condition on 7 January 2009 was the same as the market condition on 30 December 2008 and 5 January 2009; and (vii) the calculations by the investigating officer ('PW3') was wrong and his evidence should not be admissible.

Held:

(1) The standard of proof in a civil claim under s 201(6) of the CMSA has always been intended to be 'on the balance of probabilities'. Therefore, the plaintiff had a lower standard of proof compared to a case criminally prosecuted for insider trading. This burden of proof could be sufficiently discharged if the court found, on the balance of probabilities, the insider trading was likely to have happened instead of requiring the same to be proven beyond reasonable doubt (see paras 31 & 33).

(2) The circumstantial evidence indicated that the defendant had the inside information when he executed the disposal because he had maintained a close relationship with the directors of WCT. The timing of the disposal was also relevant as it occurred between the time the directors of WCT got hold of the notice of the inside information and the announcement of Bursa on 6 January 2009. The disposal happened in mere four trading days and it involved the largest selling off by the defendant in the preceding five years. Taken as a whole these factors meant that the plaintiff had successfully proven not only the defendant had the inside information but he had also executed the disposal (see para 37).

(3) The defendant was one of the founders of WCT. He knew the other founders since they were teenagers. They were all friends in the true sense of the word and not just business associates. After he retired, the defendant kept in touch with the remaining director, Peter Taing. He had free access and visited WCT's office frequently and enjoyed meals with Peter Taing to the present day. They went fishing together. In fact, the defendant and Peter Taing shared the same remisier and solicitors. As adduced in evidence, the telephone records showed that the defendant contacted Peter Taing frequently. The assertion that PW3 had given hearsay evidence in respect of the closeness of the relationship between

the defendant and the directors of WCT became irrelevant as the defendant admitted in open court about this (see paras 39–41, 45 & 132).

(4) The defendant held the shares and warrants of WCT continuously for four solid years before disposing almost all of it. The disposal conveniently happened right after WCT knew of the cancellation. The volume of the WCT shares and warrants disposed was enormous. The defendant also made use of the knowledge of the cancellation because he did not dispose his other other shares. Unlike the defendant, the public or market only knew of the inside information when WCT made the announcement to Bursa. By this time, the defendant had exercised the disposal (see paras 54–55, 57 & 64).

(5) The inside information, namely the cancellation of the contract, was material information under s 185 of the CMSA. It was an information that, on becoming generally available, would or would tend to have a material effect on the price or value of shares and warrants in WCT securities in that it would or would tend to influence reasonable persons who invest in WCT securities in deciding whether or not to acquire or dispose such securities (see para 78).

(6) The case of insider trading had been made out on the balance of probabilities against the defendant. The defendant disposed the securities wrongly only because he had the relevant information unavailable to the public. The defendant had indeed contravened s 188(2)(a) of the CMSA. He should be made liable to pay thrice the amount he had obtained from the disposal of the securities. Statutorily, he should also be liable to pay the civil penalty (see paras 134–135 & 187–188).

[Bahasa Malaysia summary

Defendan dan tiga lagi telah memulakan satu perkongsian yang dikenali sebagai WCT Earthworks and Building Contractors ('WCT'), yang kemudian diperbadankan. WCT ditukar menjadi syarikat liabiliti awam terhad bawah nama WCT Engineering Bhd dan tersenarai dalam Lembaga Kedua Bursa Malaysia Securities Bhd ('Bursa'). Defendan meletak jawatan sebagai pengarah WCT pada 1995. WCT mengisytiharkan kepada Bursa bahawa Meydan LLC ('Meydan') dari Dubai telah mengawardkan satu kontrak ('kontrak tersebut') dengan jumlah kontrak RM4.6 bilion dengan usaha sama 50:50 antara WCT dan Arabtec Constuction LLC ('Arabtec'). WCT menerima award kontrak. Kontrak tersebut melibatkan pembinaan dan penyempurnaan kerja-kerja bangunan utama ('Projek Racecourse'). Tinggal 11 bulan sahaja lagi dalam kontrak ketika Pengarah Daerah Syarikat tersebut ('Leong') dimaklumkan tentang pembatalan kontrak oleh wakil Arabtec. WCT mengumumkan kepada Bursa Malaysia bahawa Meydan telah mengeluarkan pembatalan dan Bursa mengumumkannya. Pelaburan sekuriti WCT digantung. Apabila

pelaburan bersambung, nilai saham WCT jatuh menjunam. Dalam tindakan ini, yang difailkan bawah s 188(2) Akta Pasaran Modal dan Perkhidmatan 2007 ('Akta'), plaintif menghujahkan bahawa: (a) defendan telah melupuskan saham dan jaminannya dalam WCT kerana tahu tentang maklumat dalam yang berkaitan maklumat bukan awam yang material tentang pembatalan Projek Racecourse; (b) pelupusan berlaku pada masa yang, secara ganjilnya, tepat dan berlaku sehari selepas maklumat dalaman sampai ke pengetahuan pengarah-pengarah WCT dan tamat sehari sebelum pengumuman maklumat dalam kepada Bursa; (c) selepas hampir empat tahun berterus memegang saham dan jaminan WCT dalam jumlah yang banyak, defendan tiba dan dengan gopoh melupuskan hampir kesemua saham dan jaminan WCT dalam masa hanya empat hari dalam kesemua empat akaun pelaburan bawah kawalannya; (d) defendan tidak jujur tentang hubungan rapatnya dengan pengarah-pengarah WCT; dan (e) alasan-alasan yang diberi oleh defendan tidak dapat menewaskan penelitian kerana kesemuanya tidak berasas dan jelas bertentangan. Dalam pembelaannya, defendan menghujahkan: (i) plaintif tidak boleh memohon perintah deklaratori dalam guaman sivil bawah s 200 Akta untuk mengisytiharkan dia telah melakukan kesalahan jenayah; (ii) plaintif tidak mempunyai locus standi untuk memulakan tindakan ini bawah s 200 Akta; (iii) defendan gagal membuktikan bahawa defendan mempunyai maklumat tentang pembatalan kontrak; (iv) walaupun prosiding adalah sivil, standard jenayah terpakai; (v) tidak diplidkan bahwa guaman ini dikemukakan oleh plaintif untuk menuntut ganti rugi; (vi) plaintif gagal membuktikan bahawa keadaan pasaran pada 7 Januari 2009 sama dengan keadaan pasaran pada 30 Disember 2008 dan 5 Januari 2009; dan (vii) perkiraan oleh pegawai penyiasat ('PW3') adalah terkhilaf dan keterangannya tidak harus diterima.

Diputuskan:

(1) Standard pembuktian dalam tuntutan sivil bawah s 201(6) Akta sememangnya diniatkan 'atas imbangan kebarangkalian'. Oleh itu, plaintif mempunyai standard pembuktian yang lebih rendah berbanding pendakwaan jenayah bagi pelaburan dalam. Beban pembuktian boleh dilepaskan dengan secukupnya jika mahkamah mendapati, atas imbangan kebarangkalian, pelaburan dalam mungkin akan terjadi dan bukan mengkehendaki agar ini dibuktikan melampaui keraguan munasabah (lihat perenggan 31 & 33).

(2) Keterangan ikut keadaan menunjukkan defendan mempunyai maklumat dalam apabila dia melaksanakan pelupusan kerana ni mengekalkan hubungan rapat dengan pengarah-pengarah WCT. Masa pelupusan juga relevan kerana berlaku antara masa pengarah-pengarah WCT mendapat notis maklumat dalam dan pengumuman Bursa pada 6 Januari 2009. Pelupusan berlaku dalam hanya empat hari pelaburan dan melibatkan jualan terbesar oleh defendan dalam lima tahun

terdahulu. Dilihat secara keseluruhan, faktor-faktor ini bermakna plaintif berjaya membuktikan bahawa bukan sahaja defendan mempunyai maklumat dalaman, dia juga melaksanakan pelupusan tersebut (lihat perenggan 37).

(3) Defendan adalah salah seorang pengasas WCT. Dia mengenali lain-lain pengasas sejak mereka remaja lagi. Kesemuanya adalah rakan-rakan dalam erti kata sebenar dan bukan sekadar rakan kongsi perniagaan. Selepas dia bersara, defendan mengekalkan hubungan dengan pengarah yang kekal iaitu Peter Taing. Dia mempunyai akses bebas dan sering melawat pejabat WCT dan makan bersama-sama Peter Taing hingga kini. Mereka pergi memancing bersama. Malah, defendan dan Peter berkongsi remisier dan peguamcara yang sama. Seperti yang dikemukakan dalam keterangan, rekod telefon menunjukkan defendan sering menghubungi Peter Taing. Dakwaan bahawa PW3 memberi keterangan dengar cakap tentang keintiman hubungan antara defendan dan pengarah-pengarah WCT menjadi tidak relevan kerana defendan telah mengakui dalam mahkamah terbuka tentang ini (lihat perenggan 39–41, 45 & 132).

(4) Defendan memegang saham dan jaminan WCT secara berterusan selama empat tahun sebelum melupuskan kesemuanya. Pelupusan ini berlaku sejurus selepas WCT tahu tentang pembatalan tersebut. Jumlah saham dan jaminan WCT yang dilupuskan adalah besar. Defendan juga mengguna pakai pengetahuan tentang pembatalan kerana dia tidak melupuskan saham-sahamnya yang lain. Tidak seperti defendan, awam atau pasaran yang tahu tentang maklumat dalam apabila WCT mengumumkan ini kepada Bursa. Pada waktu tersebut, defendan telah pun melaksanakan pelupusan (lihat perenggan 54–55, 57 & 64).

(5) Maklumat dalaman, khususnya pembatalan kontrak, adalah maklumat material bawah s 185 Akta. Ia adalah maklumat yang, apabila diketahui awam, akan atau berkemungkinan akan mempunyai kesan material pada harga atau nilai saham dan jaminan dalam sekuriti WCT iaitu ia akan atau mungkin akan mempengaruh orang-orang munasabah yang melabur dalam WCT dalam memutuskan sama ada atau tidak untuk memperoleh atau melupuskan sekuriti sedemikian (lihat perenggan 78).

(6) Kes pelaburan dalam berjaya dibuktikan atas imbangan kebarangkalian terhadap defendan. Defendan melupuskan sekuriti secara salah kerana dia mempunyai maklumat relevan yang tidak diketahui awam. Defendan sememangnya melanggar s 188(2)(a) Akta. Dia sepatutnya dipertanggungjawabkan untuk membayar tiga kali jumlah yang diperoleh daripada pelupusan sekuriti. Bawah statut, dia harus bertanggungjawab membayar penalti sivil (lihat perenggan 134–135 & 187–188).]

Notes

For cases on shares in general, see 11(1) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 979–1022.

Cases referred to

AEG Carapiet v AY Derderian AIR 1961 Cal 359, HC (refd)

Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal [1995] 2 MLJ 770, CA (refd)

Australian Securities and Investments Commission v Hochtief Aktiengesellschaft [2016] FCA 1489, FC (refd)

Australian Securities And Investments Commission v HLP Financial Planning (Aust) Pty and Others (2007) 245 ALR 29, FC (distd)

Australian Securities and Investments Commission v Intertax Holdings Pty Ltd [2006] QSC 276, SC (distd)

Azeff, Re 2015 OSCB 2983 (refd)

Basic Incorporated v Max L Levinson et al 485 US 224; 108 SCt 978, SC (refd)

Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors [1993] 3 MLJ 352, HC (refd)

Dato' Seri Anwar bin Ibrahim v PP and another appeal [2015] 2 MLJ 293, FC (refd)

Elizabeth Chin Yew Kim & Anor v Dato' Ong Gim Huat (sued as public officer of Hospital Lam Wah Ee) and other appeals [2017] 1 MLJ 328, CA (refd)

Elkind v Liggett & Myers Inc 635 F2d 156, 1980, SC (refd)

Fyffes plc v DCC plc [2007] IESC 36, SC (refd)

Government of Malaysia v Lim Kit Siang [1988] 2 MLJ 12, SC (distd)

Harris v American Investment Company 523 F2d 220 (1975), CA (refd)

In the Matter of Shane Suman and Monie Rahman 2012 LNONOSC 176 (refd)

Jakara Sdn Bhd v HSBC Bank Malaysia Berhad (formerly known as HongKong Bank Berhad) [2015] MLJU 1211, HC (refd)

James Hardie Industries NV v Australian Securities and Investments Commission [2010] NSWC 332, CA (refd)

Keongco Malaysia Sdn Bhd v Ng Seah Hai [2012] 7 MLJ 288, HC (refd)

Krishnan Nambiar s/o Perabakaran & Ors v Dr P Mahendran & Anor [2009] 4 MLJ 267, HC (refd)

Lew Chee Fai Kevin v Monetary Authority of Singapore [2012] 2 SLR 913; [2012] SGCA 12, CA (refd)

Lim Chee Yong & Ors v Lee Boon Su & Ors [2013] 1 LNS 642, HC (refd)

Mak Siew Wei v Dato' Dr Norbik Bashah bin Idris & Ors [2016] 11 MLJ 772, HC (refd)

Malayan Banking Bhd v KM Music Lines Sdn Bhd [2015] 5 MLJ 533, CA (refd)

Malaysia National Insurance Sdn Bhd v Malaysia Rubber Development Corporation [1986] 2 MLJ 124, SC (distd)

McKesson HBOC, Inc Securities Litigation, In Re 126 F Supp 2d, 1248 (ND Cal 2000) (not folld)

Md Hilmi bin Md Noor & Anor (suing in their personal capacities and as administrators for the deceased, Md Noor bin Mohamed) v Azman bin Ahmad & Ors [2016] 6 MLJ 205, CA (refd)
Munusamy v PP [1987] 1 MLJ 492, SC (refd)
PQ v Australian Red Cross Society and Others [1992] 1 VR 19, SC (refd)
Pacific Tin Consolidated Corporation v Hoon Wee Thim [1967] 2 MLJ 35, FC (distd)
Pet Far Eastern (M) Sdn Bhd v Tay Young Huat & Ors [1999] 5 MLJ 558, HC (refd)
PP v Chua Seng Huat [1999] 3 MLJ 305, HC (refd)
R v Farris [2015] WASC 251, SC (refd)
R v Gassy [2005] SACS 68, SC (refd)
R v Rivkin (2003) 198 ALR 400, SC (refd)
R v Turner [1975] 1 All ER 70, CA (distd)
Rooney v ABB Grain Ltd (No 2) [2011] FCA 231, FC (refd)
Samundee Devan a/l Kerishnan Muthu v PP [2009] 1 MLJ 697, CA (refd)
Securities and Exchange Commission v First City Financial Corp Ltd 890 F2d 1215 (1989), CA (refd)
Securities And Exchange Commission v James E MacDonald Jr 699 F2d 47, CA (refd)
Securities And Exchange Commission v Ratilal K Patel 61 F3d 137, CA (refd)
Sharbern Holding Inc v Vancouver Airport Centre Ltd [2011] SCJ No 23, SC (folld)
Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd [2015] 5 MLJ 1, FC (refd)
Southeast Asia Special Asset Management Berhad v L&R Holdings Sdn Bhd & Anor [2011] MLJU 522, HC (refd)
Subramaniam v PP [1956] 1 MLJ 220, PC (refd)
Victoria Insurance Co Ltd v Aik Teong Trading Co Trading [1973] 1 MLJ 15 (refd)
Wet Seal Inc Securities Litigation, In Re 518 F Supp 2d 1148 (not folld)

Legislation referred to

Capital Markets and Services Act 2007 ss 183, 183(b), 184, 185, 188(1), (1)(b), (2)(a), 200, 200(1), 201(6), (6)(a), (6)(A), (6)(b), 360(1)(a)(L)
Corporations Act 2001 [AU] s 1043A
Evidence Act 1950 ss 90A, 114(g)
Rules of Court 2012 O 40A r 3(1), (2)
Securities Industry Act 1983 (repealed by Capital Markets and Services Act 2007)
Securities and Futures Act [SG] s 218, 218(b)(i)

Benjamin John Dawson (Eileen Othman, Ng Chian Huey, Tan Hui Ru and Christopher Rajamanickam with him) (Benjamin Dawson) for the plaintiff.
Mohd Yusof Zainal Abidin (Lim Kon Keen with him) (Seow & Megat) for the defendant.

Abu Bakar Jais J:

If you want to keep a secret, you must also hide it from yourself

— George Orwell

INTRODUCTION

[1] The counsel for the plaintiff, Securities Commission Malaysia informed this court, this is the first case where the plaintiff decided to take civil action against the defendant, Chan Soon Huat for insider trading. Normally the plaintiff would initiate criminal prosecution for such cases. The defendant's counsel said there have been civil actions before but none has concluded.

[2] The defendant is one of the founders of a public listed company, WCT Bhd ('WCT'). WCT is well known in the construction industry. The defendant is alleged to make use of certain information unavailable at the material time to the general public to trade and dispose his shares and warrants in WCT.

[3] If the plaintiff succeeds in this civil action, for the first time too, the plaintiff could also recover from the defendant thrice the amount of moneys he had obtained because of the disposal of the securities.

BACKGROUND FACTS

[4] On 26 December 1979, the defendant and three others ie Taing Kim Hwa ('Peter Taing'), Wong Chew @ Wong Chwee Lai and Wong Sewe Wing had started a partnership called WCT Earthworks and Building Contractors. On 14 January 1981, WCT Earthworks and Building Contractors Sdn Bhd was incorporated by them. On 1 April 1994, WCT was converted into a public limited liability company under the name of WCT Engineering Bhd. WCT was listed on the Second Board of Bursa Malaysia Securities Bhd ('Bursa Malaysia') on 16 February 1995 and thereafter on the Main Board of Bursa Malaysia on 7 January 1999. The defendant had resigned as director of WCT on 13 August 1995.

[5] On 18 September 2007, WCT announced to Bursa Malaysia that Meydan LLC from Dubai, United Arab Emirates ('Meydan') had awarded a build-only contract ('the contract') with a contract sum worth approximately RM4.6 billion to a 50:50 unincorporated joint-venture entity set up by WCT and Arabtec Construction LLC ('Arabtec'). This joint-venture entity was known as 'Arabtec Construction LLC-WCT Engineering JV' ('the JV'). Pursuant to the same announcement, WCT announced that the JV had on 18 September 2007 accepted the award of the contract.

[6] The contract involved the construction and completion of the main building works, external works and infrastructure works in relation to the proposed construction of the 'Nad Al Sheba Dubai Racecourse' in Dubai ('the Racecourse Project'). The duration for the completion of the Racecourse Project is 25 months. The Racecourse Project is the largest job secured by WCT during the year 2007.

[7] On 25 December 2008, Meydan had given the JV 14 days' notice of the cancellation of the contract ('the cancellation of the contract'). This is a mid-stream termination. There were 11 months left in the contract. On 29 December 2008, Leong Yeon Thoong ('Leong') who was then WCT's Regional Director was informed of the cancellation of the contract by Riad Kamal, who was the representative of Arabtec in the JV. Riad had also faxed the cancellation notice to Leong. On the same day, Leong had called Liang Kai Chong ('Liang') who was WCT's executive director at the head office to inform him about the cancellation of the contract and faxed over the cancellation notice to him in WCT's office. Following this, an emergency meeting of the board of directors of WCT was called to discuss the cancellation of the contract. The emergency meeting was attended by Peter Taing, Goh Chin Liong, Loh Siew Choh, Liang and Khor Loke Yew.

[8] On 6 January 2009 at 9.02am, WCT announced to Bursa Malaysia that Meydan had issued the cancellation notice on the JV. On the same date at 11.10am, Bursa Malaysia announced vide Listing Circular No L/Q 52316 of 2009 that trading in WCT's securities had been halted with effect from 9.12am on 6 January 2009 and would resume at 2.30pm on 6 January 2009.

[9] On 6 January 2009 at 2.22pm and pursuant to the Listing Circular No L/Q 52319 of 2009 it was announced to Bursa Malaysia that at the request of WCT, trading in WCT's securities had been suspended with effect from 2.30pm on 6 January 2009 pending a material announcement.

[10] On 6 January 2009 at 2.28 pm, WCT had announced to Bursa Malaysia that Bursa Malaysia had approved WCT's request for a suspension of the trading of its securities from 2.30–5pm on 6 January 2009 pending a material announcement pertaining to the cancellation of the contract.

[11] On 6 January 2009, at 5.02pm, WCT made a further announcement to Bursa Malaysia wherein it had provided more details about the cancellation of the contract following its earlier announcement made in the morning of 6 January 2009. Amongst others, WCT had set out the background, status and financial and operational impact of the cancellation of the contract on WCT.

[12] On 6 January 2009 at 6.46pm, WCT announced to Bursa Malaysia that trading in WCT's securities would resume with effect from 9am on 7 January 2009. When trading resumed on 7 January 2009, the price of WCT Shares fell sharply from the closing price of RM1.83 on 5 January 2009 to RM1.29 and the volume of WCT Shares traded during this period was 11,129,300 shares.

THE PLAINTIFF'S CASE

[13] The plaintiff's case is that the defendant had disposed his shares and warrants in WCT whilst in possession of inside information ('the impugned disposal'). The impugned disposal commenced on the 30 December 2008 and ceased on 5 January 2009. The inside information relates to a material non-public information on the cancellation of the Racecourse Project, WCT's joint-venture project in Dubai worth about RM4.6 billion ('the inside information'). The impugned disposal was according to the plaintiff 'unnaturally timely'. It took place a day immediately after the inside information came to the knowledge of the directors of WCT and ceased just a day before WCT's announcement of the inside information to Bursa Malaysia ('the impugned period'). After almost four years of continuously holding WCT Shares and Warrants in considerable volume, the defendant suddenly and hastily disposed almost entirely all his WCT Shares and Warrants in just four days in all four trading accounts under his control. The defendant is no mere ordinary investor in WCT. He was one of its founders. Even after his retirement from WCT, he had maintained a close relationship with the directors of WCT. The defendant, however was not forthcoming about his close relationship with the directors of WCT. In his defence, he has denied it. He only conceded to it later during cross-examination. During the impugned period, the defendant held shares in various other counters. Tellingly, he only disposed his WCT shares and warrants and not the others.

[14] The reasons given by the defendant for the impugned disposal do not stand up to scrutiny. They were unsubstantiated and clearly contrived. It is the plaintiff's case that the inside information is 'material' within the meaning of s 185 of the Capital Markets and Services Act 2007 ('the CMSA').

[15] The relationship factor, timing, peculiar characteristic of the impugned disposal and the totality of the circumstances of the case including the defendant's lack of candour and truthfulness on several instances compellingly lead to the conclusion that the impugned disposal was not a mere fortuitous coincidence. Rather, the defendant had undertaken the impugned disposal whilst he was in possession of the inside information.

THE CLAIM UNDER S 188(2)(a) OF THE CMSA

[16] Section 188(1) of the CMSA 2007 reads as follows:

> Prohibited conduct of person in possession of Inside Information.
>
> (1) A person is an 'insider' if that person —
>
> (a) possess information that is not generally available which on becoming generally available a person would expect it to have a material effect on the price or the value of securities; and
>
> (b) knows or ought reasonably to know that the information is not generally available.

[17] Section 188(2)(a) of the CMSA 2007 reads as follows:

> An insider shall not whether as principal or agent, in respect of any securities to which information in subsection (1) relates —
>
> (a) acquire or dispose of, or enter into an agreement for or with a view to the acquisition or disposal of such securities.

[18] Taking note of s 188(1) read with s 188(2)(a) of the CMSA, the plaintiff argued that:

(a) the defendant was in possession of the inside information when he undertook the impugned disposal;

(b) the inside information was not generally available at the date of the impugned disposal;

(c) the defendant knew and or ought to have known at the time when he undertook the impugned disposal that the inside information was not generally available; and

(d) the inside information when it is generally available, a reasonable person would expect it to have a material effect on the price or the value of shares and warrants in WCT.

THE DEFENDANT'S CASE

[19] The defendant is the only witness to defend himself. No other witness had been called on his behalf. The summary of the defendant's case is as follows.

[20] The defendant, during the course of trial, objected first to the admissibility of the plaintiff's investigating officer, PW3's evidence and the admissibility of certain parts of the plaintiff's expert's evidence PW12.

[21] The defendant is of the view that the plaintiff cannot seek for a

declaratory order in a civil suit brought under s 200 of the CMSA, to declare that he had committed a criminal offence.

[22] The defendant argued that the plaintiff has no locus standi to bring this action under s 200 CMSA to claim for damages of RM3,238,760.55 from the defendant and the plaintiff has not proven the alleged damages of RM3,238,760.55 and raised the issue what ought to be the correct mechanism that should be adopted for such proof.

[23] The defendant submitted the plaintiff has not proven that the defendant was in possession of the information relating to the cancellation of contract. The plaintiff also has not proven the materiality of the information possessed by the defendant and what is the correct approach to be adopted in assessing the materiality of information.

[24] The defendant argued although the proceedings is civil, the nature of the particular issue involved made it appropriate to apply the criminal standard. Also, that the more serious the allegation, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probabilities.

[25] It was not pleaded in the statement of claim that the instant suit was brought by the plaintiff to claim for the damages and the civil penalty because the plaintiff considers that it is in the public interest to do so. The defendant submitted that for matters that was not pleaded, evidence ought not to be adduced. There must be evidence that the Securities Commission, not the investigating officer of the plaintiff, PW3, has considered that it is in the public interest to do so.

[26] The defendant also submitted, the plaintiff has also failed to establish the market condition on 7 January 2009 are the same as the market condition on 30 December 2008–5 January 2009. To analyse this market condition, it can only be done by the expert who had received professional training in analysing the market condition.

[27] Further, the plaintiff's investigating officer, PW 3's calculation is wrong and against s 201(6)(A) of the CMSA as it states that the plaintiff is entitled to claim three times the difference between the price the defendant disposed WCT's shares and the price WCT's shares would have been if the information is available, and not how much losses the defendant had avoided.

[28] Therefore, the defendant submitted that the plaintiff had failed to prove the damages under s 201(6)(A) of the CMSA and should not be entitled to claim the same from the defendant.

[29] Other contentions of the defendants are addressed in the paragraphs below in respect of this court's findings and analysis.

THE COURT'S FINDINGS AND ANALYSIS

The standard of proof

[30] First it is appropriate to address the standard of proof for the plaintiff in this case. The plaintiff's claim in respect of civil action for insider trading against the defendant is premised on s 201(6) of the CMSA which reads as follows:

> Where an insider disposed of or agreed to dispose of, or procured another person to dispose of or agree to dispose of, securities, in contravention of subsection 188(2), and such securities were permitted to be traded on a stock market of a stock exchange, then, whether or not the insider had been charged with an offence in respect of the contravention or whether or not the contravention had been proved in a prosecution, the Commission may, if the Commission considers that it is in the public interest to do so, *by civil action*, take any or both of the following actions, against the insider or any other person involved in the contravention —
>
> (A) recover an amount equal to three times the amount being the difference between the price at which the securities were disposed of, or agreed to be disposed of, by the insider or the other person, and the price at which they would have been likely to have been disposed of at the time of the disposal or agreement, as the case may be, if the information had been generally available; and
>
> (B) claim civil penalty in such amount as the court considers appropriate having regard to the seriousness of the contravention, being an amount not more than one million ringgit. (Emphasis added.)

[31] The standard of proof in a civil claim under s 201(6) of the CMSA has always been intended to be 'on the balance of probabilities'. This is reflected in the extract of the speech by the Honourable Deputy Finance Minister taken from the 'Penyata Rasmi Parlimen, Dewan Rakyat' dated 17 December 1997 during the introduction of the bill to amend the Securities Industry Act 1983, the precursor to the CMSA, when the current provisions to insider trading were introduced, where he said:

> Sementara itu tindakan sivil hendaklah diperkenalkan dalam soal ini kerana darjah pembuktian adalah dihadkan kepada imbangan kebarangkalian sahaja, tidak seperti tindakan jenayah yang mempunyai darjah pembuktian yang tinggi iaitu melebihi keraguan yang munasabah atau beyond reasonable doubt.

[32] The application of the standard on balance of probabilities for a claim under s 201(6) read with s 188(2)(a) of the CMSA was also re-affirmed in *Mak*

Siew Wei v Dato' Dr Norbik Bashah bin Idris & Ors [2016] 11 MLJ 772. The Court of Appeal too decided the standard on the balance of probabilities means that the event was more likely than not to happen in *Md Hilmi bin Md Noor & Anor (suing in their personal capacities and as administrators for the deceased, Md Noor bin Mohamed) v Azman bin Ahmad & Ors* [2016] 6 MLJ 205. The plaintiff only needs to prove that it was at least 51% likely that the event has occurred as decided by the Court of Appeal in *Elizabeth Chin Yew Kim & Anor v Dato' Ong Gim Huat (sued as public officer of Hospital Lam Wah Ee) and other appeals* [2017] 1 MLJ 328.

[33] Thus, it ought to be clear that the plaintiff in the present case, has a lower standard of proof compared to a case criminally prosecuted for insider trading. This burden of proof could be sufficiently discharged if this court finds on the balance of probabilities, the insider trading is likely to have happened instead of requiring the same to be proven beyond reasonable doubt.

[34] The defendant as indicated, contended that for evidence on the balance of probabilities, the more serious the allegation, the stronger should the evidence be before the court. This with respect is wrong as the Federal Court in *Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd* [2015] 5 MLJ 1 has already decided there is no heightened standard of proof in achieving 'on the balance of probabilities' for civil cases. The approach should be at the end of the case, considering all the evidence adduced, can it be said the balance is tilted to find insider trading is proven. There is no greater burden.

Was the defendant in possession of the inside information?

[35] The next consideration on the claim of the plaintiff ought to be whether the defendant was in possession of the inside information. There is no issue of the defendant infringing the statutory provisions regarding insider trading if in the first place it is not proven that he had the relevant information.

[36] In this regard, the case *In the Matter of Shane Suman and Monie Rahman* 2012 LNONOSC 176, explains 'knowledge' and 'possession' can be imputed as follows:

> In Larrabee, a case applying the criminal standard of proof, the US Court of Appeal looked at the circumstances surrounding the alleged insider tip, which the accused denied receiving. The Court held that 'while opportunity alone does not constitute proof of possession, opportunity in combination with circumstantial evidence of a well-timed and well-orchestrated sequence of events, culminating with successful stock trades, creates a compelling inference of possession by the tippee'. The Court considered the following factors: (i) the tippee's access to the information; (ii) the relationship between the tipper and the tippee; (iii) the timing of the contact

between the tipper and the tippee; (iv) the timing of the trades; (v) the pattern of the trades, including the uncharacteristic size; and (vi) the attempts to conceal the trades or the relationship between the tipper and the tippee. The Court concluded:

> *When assembled, the pieces of the puzzle create a picture that supports the inference that Larrabee did possess material, non-public information about the bank merger [and misappropriated it].*

In *Re Azeff* 2015 OSCB 2983 it is said:

> Circumstantial evidence is clearly admissible (*Re Kusumoto* 2007 ABASC 40 at paras 73–74). It usually forms the bulk of the evidence in cases where insider trading and tippling is alleged. Some aspects of insider trading cases, such as fiduciary duty and duty not to disclose material non-public information, are relatively easy to prove. Other aspects, particularly tipping, are very difficult to prove as, generally only persons who have direct knowledge of the relevant communications are the wrongdoers themselves. As a result, insider trading and tipping cases are often established by inferences drawn from indirect evidence. In this case, circumstantial evidence is the evidence of communication, the relationship between the parties, the knowledge that the tipper informant had, the knowledge the tippee had, the trading by the tippee and/or successive tippees and the timing and volume of the trades in relation to the initiating conversation and successive tips.
>
> ...
>
> The indicators listed in the paragraphs above are not exhaustive. Nor is it necessary that all indicia be established in every case. Insider trading and tipping cases are established by the mosaic of circumstantial evidence which, when considered as a whole, leads to the inference that it is more likely than not the trader, tipper or tippee possessed or communicated material non-public information.

[37] Hence, it is important to note, as explained in the cases above, circumstantial evidence can be considered to find that a party is involved in insider trading. There is no need for direct evidence. In this regard, there is no need to show the exact information conveyed to the insider or whether it is proven who had conveyed the information to the insider. Likewise, the circumstantial evidence adduced during trial in the present case indicates the defendant had the inside information when he executed the impugned disposal because he had maintained close relationship with the directors of WCT. During trial he was initially evasive about his relationship with the directors of WCT but eventually admitted it. The timing of the impugned disposal is also relevant as it occurred between the time the directors of WCT got hold of the notice of the inside information and the announcement to Bursa on 6 January 2009. The impugned disposal happened in mere four trading days. The disposal involved the largest selling off by the defendant in the preceding five years. Only WCT shares and warrants were disposed but not, other shares. All these suggest that by way of circumstantial evidence, he had the inside information and had used it for the impugned disposal. All these factors will be

elaborated in a short while. Taken as a whole, these factors mean the plaintiff had successfully proven not only the defendant had the inside information but he had also executed the impugned disposal. Because circumstantial evidence can be considered, it is pointless for the defendant to argue there is no direct evidence that the defendant had used the relevant information to trade on WCT's securities. The same applies for the argument by the defendant that there is no evidence too that the defendant knew of the cancellation of the contract. Direct evidence should be required as strongly suggested by the defendant but the present case is different because there are several factors which as stated will be elaborated in a short while, pointing to the fact the defendant disposed the securities as an insider having the relevant information unavailable to the public. As circumstantial evidence is relevant, this court cannot with respect accept the defendant's contention that the plaintiff did not prove what was the information exactly communicated to the defendant and that there is no evidence who communicated this information to the defendant. Based on circumstantial evidence, the defendant was in possession of the inside information.

[38] As the proof required is on the balance of probabilities, there should be no issue that the circumstantial evidence must point irresistibly to the liability of the defendant. The present case as pointed out did not proceed as a criminal prosecution. And since this is civil action, the burden of proof is lessened. As long as there are facts pointing to circumstantial evidence, the insider could be found liable. Of course, if the circumstantial evidence is found wanting, the alleged offender should be protected from being made answerable. In the end, the court has that duty to assess and evaluate whether that circumstantial adduced is sufficient. It should not be too difficult to appreciate that direct evidence is not easily available when confidential information is shared by a few individuals with the aim for profit or avoiding losses. And our statutory provision allows for civil action and the cases highlighted without doubt do not prohibit circumstantial evidence. More than that, as shown, the cases and intention of the legislature has always been for insider trading to be proven on the balance of probabilities instead of beyond reasonable doubt when civil action is initiated. Therefore, this court accepts that circumstantial evidence should not without cogent reasons be rejected especially when the burden is on the balance of probabilities.

The relationship

[39] As indicated earlier the defendant is one of the founders of WCT. He knew the other founders, Peter Taing and Wong Chwee Lai since they were teenagers. The other founder was Wong Sewe Wing. After 14 years in the company, the defendant retired in 1995. During this time his relationship with Peter Taing and Wong Sewe Wing grew. Peter Taing remained as a director of

WCT until 2016 and was thereafter appointed a consultant in the company. Wong Sewe Wing remained a director until a few years ago. Peter Taing was the managing director of WCT. He was also an EXCO member of the JV. They were all friends in the true sense of the word and not just business associates.

[40] After he retired, the defendant kept in touch with Peter Taing. He had free access and visited WCT's office frequently and enjoyed meals with Peter Taing to the present day. They went fishing together.

[41] The defendant shares the same remisier with Peter Taing and also the same solicitors.

[42] The defendant contacted Peter Taing by phone frequently. From May 2008–January 2009 the phone calls were as follows:

Period	No of calls
18 May 2008–17 June 2008	5
18 June 2008–17 July 2008	9
18 July 2008–17 August 2008	10
18 August 2008–17 September 2008	19
18 September 2008–17 October 2008	15
18 October 2008–17 November 2008	16
18 November 2008–17 December 2008	3
18 December 2008–17 January 2009	8

[43] Eliana bt Abdul Talib, PW10, from the phone company gave evidence the frequent phone calls from the defendant to Peter Taing and WCT as follows:

Date	Outgoing calls from the defendant's cell phone	No of calls
22 December 2008	019-2297236 (Peter Taing)	3
29 December 2008	019-2297236 (Peter Taing)	2
29 December 2008	012-2297236 (WCT)	1
30 December .2008	012-2297236 (WCT)	1
19 January 2009	03-78052266 (land line of WCT)	1

[44] The defendant raised objection with respect to the certificates issued

under s 90A of the Evidence Act 1950 pertaining to the records in respect of the phone calls. The contention is that for the certificates to stand, it can only cover the period until July or August 2009 and not prior to this. Meaning, calls made earlier than July or August 2009 are not covered by the certificates because the testimony given for the plaintiff is that the records were kept only for seven years.

[45] Nothing turns on this objection as the defendant admitted the telephone records as reflecting the calls made by him. He admitted making and receiving calls from Peter Taing. Peter Taing's telephone records produced during trial was also never challenged by the defendant. Besides, the witnesses for the plaintiff from the telephone companies testified for calls made prior to July 2009, they were able to produce them as they still have the same.

[46] When the defendant retired from WCT, he was appointed a director of ARA Holding Sdn Bhd ('ARA Holding'). ARA Holding is a company that supplies concrete to WCT. The defendant testified that ARA Holding is a subsidiary of WCT. The defendant retired from ARA Holding in 2000. This could only happen because of the trust placed by the directors of WCT on the defendant.

[47] The defendant also gave evidence that he would sign any document if it was given and requested by Peter Taing.

[48] The defendant even admitted in court his close relationship with the directors of WCT.

[49] By circumstantial evidence, all these facts showed the defendant had the ability and opportunity to acquire and had indeed acquired the inside information. Of course having close relationship alone with individuals in WCT is insufficient. But the other factors highlighted below will point to the fact that the defendant should be liable for insider trading.

The unnaturally timely impugned disposal

[50] Leong, PW1 gave evidence that he was informed of the cancellation notice on 29 December 2008. He then faxed the same to Liang, PW2 on the same day. Liang in his evidence has stated that if the JV did not hear from Meydan on the cancellation notice, the Board of Directors of WCT would make an announcement to Bursa on the 6 January 2009. This is what he said:

> CLM: That is correct. Which means that, before WCT see the announcement in Reuters, there is no decision to make the announcement of the termination on 9 of, on 6.01.2009? Am I correct to say so?

PW2: We were in Dubai trying to meet up with the client, to try to resolve the issue, to check the, whether the termination is authentic, because the document given to us was just a faxed copy. So we were making efforts, Board were there, so we were making effort there. The Board decided during the Emergency Board Meeting (ie on 29.12.2008) that in the event we can't find any concrete response from them, we will announce on the 6th anyway but in an orderly manner, not in a rush and brief announcement like this. That was what happened in Dubai.

[51] Liang, PW2 testified:

CLM: So on 29th, you wouldn't know that whether the announcement on the termination would have been made either on 30th, 1st, 2nd, 3rd, 4th or 5th, am I right?

PW2: Yes. But there will be a date that we, the Board decided that beyond that date, we have to make announcement anyway after effort are made to try to rescue.

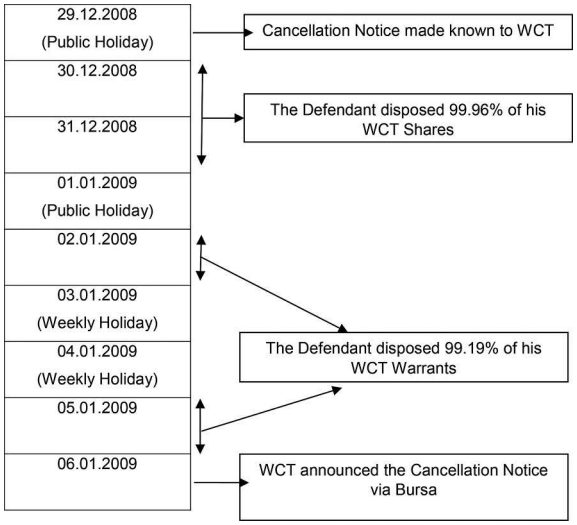
CLM: What was the date?

PW2: On the 6th.

CLM: On the 6th?

PW2: But in an orderly manner. That was the plan, yes.

[52] Arising from the above, as stated the impugned disposal commenced on the 30 December 2008 and ceased on 5 January 2009. It was indeed unnaturally timely.



[53] The defendant's case is that there is no certainty in Meydan's intention as regard the cancellation notice. Whatever the effect of the contention by the

defendant here, the fact remains there was no retraction of the cancellation notice by Meydan. The cancellation notice remained good as at 29 December 2008.

The nature of the impugned disposal

[54] The defendant held the shares and warrant of WCT continuously for four solid years before disposing almost all of it. The disposal conveniently happened right after WCT knew of the cancellation. After the impugned disposal, what remained were 1,066 WCT shares and 10,071 WCT warrants. The details are as follows:

	Units of WCT Shares held prior of the disposal	Units of WCT Shares held after the disposal	Percentage of disposal	Units of WCT Warrants held prior to the disposal	Units of WCT Warrants held after the disposal	Percentage of Disposal
Defendant's AMS Account	598,951	951	99.84%	953,477	477	99.95%
Defendant's TA Account	718,600	0	100%	203,720	20	99.99%
Chew's Account	128,115	115	99.91%	9,574	9,574	0%
Leong's Account	970,000	0	100%	80,000	0	100%
Total	**2,415,666**	**1066**	**99.96%**	**1,246,771**	**10,071**	**99.19%**

[55] The volume of WCT shares and warrants disposed was enormous. The total WCT shares disposed on 30 December 2008 and 31 December 2008 was 2,414,600 and the total WCT Warrants disposed on 2 January 2009 and 5 January 2009 was 1,236,700.

[56] The defendant cleared all four trading accounts at the same time. This cannot be coincidental and unplanned. The defendant in a haste suddenly disposed his WCT shares and warrants. The impugned disposal started as early as 9:27:49am on 30 December 2008 and it continued for all four trading days between 29 December 2008 to 6 January 2009.

[57] The defendant also made use of the knowledge of the cancellation because he did not dispose his other shares. He only disposed his WCT shares and warrants during the impugned period. His testimony in court on the matter is as follows:

> BJD: Okay. Alright. During that same period Mr. Chan, the 30th of December to 5th of January, from your statement of account, you

also hold shares in Guocoland, DRB HICOM, PICA, Crest Builder and Genting, but the only counter you sold was WCT, do you recall that?

DW: Yes.

The disposal pattern

[58] The single largest disposal on 30 December 2008 by the defendant was in respect of the WCT Shares since 2005. While the largest single disposal since 2005 of the WCT Warrants happened on 2 January 2009. There is no disposal based on market sentiment as suggested by the defendant. This is unlikely as the cancellation was on 29 December 2008 and the market knew about it only on 6 January 2009. In between these dates, the defendant happily disposed the shares and warrants ahead of everyone else in the market. His disposal of WCT Shares on 30 December 2008 constituted 46.35% of the total volume traded on WCT Shares. His disposal on 2 January 2009 on WCT Warrants constituted 60.16% of the total volume of WCT Warrants disposed on 2 January 2009.

[59] It is also unlikely that he had disposed these shares and warrants so as to buy a shop for business as he gave evidence in court. This is because this was not stated in his witness statement but was said only in cross-examination. Neither could his testimony that he needed the money be accepted because he had frequently gambled, as this piece of evidence was also not indicated in his witness statement. These matters arose only as afterthoughts in cross-examination as a desperate attempt to explain himself of the sudden impugned disposal.

[60] Further, there is no independent evidence regarding the purchase of the shop nor anyone coming to support the defendant about his gambling activities.

Where the defendant had placed the proceeds for the impugned disposal

[61] The impugned disposal resulted in the defendant having a total sales proceeds of RM4,085,754.32 ('the sales proceeds'). Out of the sales proceeds, the defendant did the following:

(a) a sum of RM3,510,000 or 85.91% of the sales proceeds was placed by the defendant into his fixed deposit account at CIMB Bank Bhd on 14 January 2009 and 20 January 2009;

(b) a sum of RM243,627.79 was deposited by the defendant back into his trading account on 7 January 2009; and

(c) a sum of RM198,222.01 was deposited by the defendant into his daughter, Chan Choon Chew's ('Chan') account with CIMB Bank Bhd on 5 January 2009. Out of this amount, a sum of RM150,000. was thereafter paid out by Chan to her four siblings and herself.

[62] The aforesaid placements account for RM3,951,849.80 or 96.72% of the sales proceeds.

[63] The defendant's retention of more than 85.91% of the sales proceeds immediately after the impugned disposal cannot support his contention that he needed the money for the shop and to pay his creditors for his gambling activities.

Time when the public knew of inside information

[64] Unlike the defendant, the public or market only knew of the inside information on 6 January 2009. This happened when WCT made the announcement to Bursa. By this time the defendant had exercised the impugned disposal.

[65] Section 183 of the CMSA provides as follows:

> Information
>
> For the purposes of this Subdivision, 'information' includes —
>
> (a) matters of supposition and other matters that are insufficiently definite to warrant being made known to the public;
>
> (b) matters relating to the intentions, or likely intentions, of a person;
>
> (c) matters relating to negotiations or proposals with respect to —
>
> (i) commercial dealings; or
>
> (ii) dealing in securities;
>
> (iii) information relating to the financial performance of a corporation;
>
> (iv) information that a person proposes to enter into, or has previously entered into one or more transactions or agreements in relation to securities or has prepared or proposes to issue a statement relating to such securities; and
>
> (v) matters relating to the future.

[66] By virtue of the above, the inside information falls squarely within s 183(b) of the CMSA.

[67] Section 184 of the CMSA provides as follows:

Information generally available

(1) For the purposes of this Subdivision, information is generally available if the information has been made known in a manner that would, or would tend to, bring it to the attention of reasonable persons who invest in securities of a kind whose price or value might be affected by the information, and since it was so made known, a reasonable period for it to be disseminated among, and assimilated by, such persons has elapsed.

[68] The above indicates a certain time is required for dissemination and assimilation of the information. And in this case the public knew of the inside information only on 6 January 2009.

[69] *R v Rivkin* (2003) 198 ALR 400 is a case where the Supreme Court of New South Wales decided information must not be conveyed through other sources such as media, before it can be said that the information was only generally available to the public on a certain date and time.

[70] In this regard, WCT's Executive Director, Liang, PW2 had confirmed that WCT had not made any announcement to the public on the cancellation of the contract, prior to its announcement to Bursa Malaysia on 6 January 2009 at 9.02am.

The test to see whether the defendant knew the information was not generally available

[71] The Singapore's Court of Appeal in *Lew Chee Fai Kevin v Monetary Authority of Singapore* [2012] 2 SLR 913; [2012] SGCA 12 dealt with the issue whether the insider 'knew or ought reasonably to know' that the inside information was not generally available. The applicable provision in that case was s 218 of the Singapore Securities and Futures Act ('the SFA'). Section 218(b)(i) of the SFA is similar to our s 188(1)(b) of the CMSA. The Singapore's provision states:

(b) the connected person knows or ought reasonably to know that —

(i) the information is not generally available; and

(ii) if it were generally available, it might have a material effect on the price or value of those securities of that corporation

The court held:

The judge did not elaborate on how the objective mens rea limb of s 218(1)(b) (ie, the 'ought reasonably to know' limb) should be interpreted. In this regard, we are of the view that the interpretation proffered in *R v Rivkin* supra with regard to the equivalent Australian legislation ought to be adopted. In *R v Rivkin* , the court held

A (at [94]) that the 'ought reasonably to know' limb 'remain[ed] one that [was] subjective to the [person], having regard to all of the relevant circumstances, including the [person's] mental state at the time' [emphasis added] ('the *Rivkin* test'). *Hence, in examining the issue of whether the alleged insider trader knew or ought reasonably to have known that the information in question was not generally available,* B *the court concerned should first consider if a reasonable person would consider the information not to be generally available. If so, consideration would then be given to the alleged insider trader's circumstances (including his or her mental state, experience and level of commercial expertise) in order to determine if there are subjective factors which would prevent him from arriving at the same conclusion.* This analysis applies to both C s 218(1)(b)(i) (ie, mens rea with regard to general availability of the information) and s 218(1)(b)(ii) (ie, mens rea that the information might have a material effect). (Emphasis added.)

[72] A similar question arose in *R v Farris* [2015] WASC 251. In this case, D the Supreme Court of Western Australia was asked to determine the applicable test for s 1043A of the Corporations Act 2001 ('the CA'). It should be noted that s 1043A of the CA is similar to s 188(1)(b) of the CMSA in that they both stipulate that a person is an 'insider' if 'that person knows or ought reasonably to know that the information is not generally available'. On this issue, the court E held that the same was to be decided based on the objective facts as follows:

> The effect of s 1043A is to create a class of persons who by reason of their possession of Inside Information are prohibited from trading: *Mansfield v R* (2012) 247 CLR 86; 293 ALR 1; 91 ACSR 1; [2012] HCA 49. If a person possesses information, F that he knows is not generally available and is price sensitive, the prohibition on trading will apply whether or not he consciously brings to mind that information and its nature at the time he makes a decision to trade in shares. The reason for the alternative between 'knows' and 'ought to know' is not to deal with lapses of memory or a failure to recall the true nature of the information possessed but to deal with the situation where a person possesses Inside Information and fails to G appreciate that it is not generally available or price sensitive where the objectively available circumstances should have led them to that conclusion.

[73] In the present case, the determination that the defendant knew the H inside information was not available to the public is made easier because of his admission as follows:

> BJD: And you didn't read anything in the newspaper before 6th of January 2009 about the cancellation of the WCT's racecourse project?
>
> I DW: I did not read because there is nothing to read.
>
> BJD: Your remisier didn't tell you that there was a cancellation of the project before the 6th of January 2009, right?
>
> DW: I think they also don't know.

BJD: Ok, now you don't remember reading anything in the public domain that there was a cancellation of the racecourse project before the 6th of January 2009, right?

DW: No.

BJD: I put it to you that the cancellation notice, sorry of the project ya, only became generally available when WCT made the announcement to Bursa on the 6th of January 2009.

DW: Yes.

[74] Based on the aforesaid, it has been established that the defendant knew at the time of the impugned disposal, that the information on the cancellation of the contract had not yet been announced and made generally available to the public at large.

The materiality of the inside information

[75] The inside information obtained by the defendant must be material information for the general public. It means that with the information, if it is available to the general public, the price of the particular securities ie WCT shares and warrants would have a significant change when it is traded in the open market. A cancellation of a major contract or project, if it is known to the general public, more likely will both result in the price of the securities to be largely affected and affecting the general public's decision to trade on the securities.

[76] There is no need for a complex and elaborate formulation of what constitute material information. The facts of this case show that the information is material, otherwise the defendant would not have sold a huge chunk of his securities on a short span of time. This court takes the approach that determining the materiality of the information must not be determined only by looking at the possible reaction of the public, but it can also take into account the very conduct of the defendant in this case. The information is material depending on the facts of each case. This court have considered the totality of the evidence in the conclusion that the information is indeed material including by considering the action of the defendant himself in disposing the securities.

[77] Section 185 of the CMSA provides that:

Material effect on price or value of securities.

For the purposes of this Subdivision, an information that on becoming generally available would or would tend to have a material effect on the price or value of securities, refers to such information which would or would tend to, on becoming

generally available, influence reasonable persons who invest in securities in deciding whether or not to acquire or dispose of such securities, or enter into an agreement with a view to acquire or dispose of such securities.

[78] In this case, the inside information namely the cancellation of the contract, is 'material' information under s 185 of the CMSA. It is an information that on becoming generally available would or would tend to have a material effect on the price or value of shares and warrants in WCT ('WCT securities') in that it would or would tend to influence reasonable persons who invest in WCT securities in deciding whether or not to acquire or dispose of such securities.

[79] Largely this is because, the Racecourse Project was the largest contract secured by WCT in 2007. As stated it is a contract worth RM4.6 billion. In WCT's Annual Report for the year 2007, it was also stated that the largest job secured was Meydan Racecourse, valued at RM4.6 billion.

[80] In this regard, the defendant himself has admitted the effect of an award or contract and its cancellation in in testimony as follows:

BJD: As an investor Mr Chan would you agree that if a company secures a large project, that will be good news for the counter?

...

BJD: Conversely, on the opposite if a company loses a large contract,that will be bad news for the investors of the shares?

DW: Agree.

[81] The plaintiff's expert, PW12 has also in his testimony stated the following:

PW: In the simplicity of matters, the cancellation of a company's biggest project would, would give an impression to the reasonable investor a sense of materiality. However, as an expert opinion I believe that I should provide further context introducing a higher degree of quantifiable measures of that materiality, hence the use of OSK report and the projections. If the projections are removed, then the question as to whether a person will still consider it to be material, then that would be an opinion, that it is. Hence my opinion that without the OSK projection, the material information is still material.

[82] Indeed the cancellation of the contract of this magnitude, is 'material' within the meaning of s 185 of the CMSA.

Bursa Malaysia's finding that the cancellation of contract is material information

[83] Bursa Malaysia the regulator for all listed issuers had also considered the cancellation of the contract to mean 'material information' within para 9.03(1) of the Main Market Listing Requirements. Paragraph 9.03(1) of the Main Market Listing Requirements ('LR') provides that a listed issuer must make immediate public disclosure of any material information and information is considered material if it is reasonably expected to have a material effect on the price, value or market activity of any listed issuer's securities or the decision of a holder of securities of the listed issuer or an investor in determining his choice of action. Indeed, the substance of para 9.03(1) of the LR is similar to s 185 of the CMSA.

[84] On 13 July 2009, Bursa Malaysia issued a notice to show cause against WCT for their non-compliance of para 9.03(1) of the LR. In this notice to show cause, Bursa Malaysia states:

> Pursuant to paragraph 9.03(1) of the Listing Requirements of Bursa Malaysia Securities Berhad ('LR'), a listed issuer must make immediate public disclosure of any material information and information is considered material if it is reasonably expected to have a material effect on the price, value or market activity of any listed issuer's securities or the decision of a holder of securities of the listed issuer or an investor in determining his choice of action.

[85] WCT on its part, had acknowledged that the inside information on the cancellation of the contract is 'material information' within para 9.03(1) of the LR. In WCT's written representation vide their letter dated 30 July 2009, they had stated that:

> We acknowledge that information on the Cancellation was 'material information' within the meaning of paragraph 9.03(1) of the LR.

The price of WCT securities had significantly dropped following the public announcement of the cancellation notice by WCT on 6 July 2009

[86] The investigating officer of the plaintiff PW3, gave evidence on the actual market impact of the announcement of the cancellation notice on the price and trading volume of WCT securities. His analysis is based on the price and volume of WCT shares at TAB 37 of Bundle A and the price and volume of WCT warrants — WB at TAB 38 of Bundle A and are set out below.

[87] WCT's share price had closed at RM1.83 per share on 5 January 2009. After the announcement on 6 January 2009, WCT's share price had closed at RM1.29 per share on 6 January 2009. This was a decline of 29.5%.

$$\frac{1.83 - 1.29}{1.83} \times 100\% = 29.5\%$$

[88] Thereafter when the suspension on WCT securities was lifted and trading resumed on 7 January 2009, WCTs' share price had further declined by 11.63% to close at RM1.14 per share on 7 January 2009.

$$\frac{1.29 - 1.14}{1.29} \times 100\% = 11.63\%$$

[89] By the same token, WCT's Warrant price had closed at RM0.29 per warrant on 5 January 2009. After the announcement on 6 January 2009, WCT's Warrant price had closed at RM0.16 per warrant on 6 January 2009.

[90] This constituted a massive decline of 44.83%.

$$\frac{0.29 - 0.16}{0.29} \times 100\% = 44.83\%$$

[91] Subsequently when the suspension on WCT securities was lifted and trading resumed on 7 January 2009, the warrant price had closed at RM0.205 on 7 January 2009. This amounts to a decline of 29.31% from the market position before the announcement on 6 January 2009.

$$\frac{0.29 - 0.205}{0.29} \times 100\% = 29.31\%$$

[92] Similarly, it can be seen that an average of 2.83 million WCT shares was traded in the seven day period before the announcement ie between 23 December 2008 and 5 January 2009. An average of 21.51 million WCT shares was traded in the seven day period after the announcement between 7–15 January 2009.

[93] This was an increase of approximately 7.6 times the daily average of trades in the seven day period before the Announcement compared with the seven day period after the announcement.

[94] The arithmetic shows that the cancellation of the contract had a very significant effect on the price of WCT securities. This means the inside information is material.

The expert opined that the cancellation of the contract is 'material' information under s 185 of the CMSA

[95] The plaintiff's expert PW12 said in his report dated 9 September 2015 ('the expert report') that the announcement on the cancellation would or

would tend to influence a reasonable investor who invests in securities on Bursa in deciding whether or not to acquire or dispose shares in WCT. Further it would tend to influence a reasonable investor who invests in securities on Bursa in deciding whether or not to acquire or dispose WCT-WB warrants. He is also of the view that the inside information is 'material' information that would or would tend to influence a reasonable investor who invests in securities on Bursa Securities in deciding whether or not to dispose of the shares and warrants in WCT.

[96] To determine 'who is a reasonable investor', the expert relied on the definition given in *Public Prosecutor v Chua Seng Huat* [1999] 3 MLJ 305. In this case the High Court held a reasonable investor as 'an investor who possess general professional knowledge as opposed to the daily retailer or a person who has made specific researches'.

[97] As to 'what are the characteristics of 'material information', the expert had derived the common characteristics of 'material' information by looking at the relevant provisions of the CMSA and also considering the various statutory definitions of 'material information' adopted by the financial industry including the *Standard IIA, CFA Institute (2010) Standard of Practice Handbook* (10th Ed) ('the CFA Handbook'), the Main Market Listing Requirements and the International Standards of Auditing 320 ('the ISA 320').

[98] Based on his analysis of the abovementioned sources, the expert had opined that the characteristics of 'material' information or the criteria for determining the 'materiality' of a particular information is dependent upon five factors:

(a) the substance of the information;

(b) the specificity of the information;

(c) the reliability of the source of the information;

(d) whether there was any ambiguity in the information; and

(e) whether the information was within the expectation of the reasonable investor.

[99] The expert concluded that the inside information had satisfied the five criteria of materiality above.

[100] The defendant did not tender any expert evidence to rebut the plaintiff's expert's findings. It is trite that as a general rule the expert evidence must be rebutted by another expert evidence. See *Dato' Seri Anwar bin Ibrahim v Public Prosecutor and another appeal* [2015] 2 MLJ 293 and *Samundee Devan*

a/l Kerishnan Muthu v Public Prosecutor [2009] 1 MLJ 697.

[101] The expert has given his opinion on whether the cancellation of the contract is 'material' on two basis. Firstly, with reference to the OSK analysis and WCT's financial impact announcement and secondly, without reference to these two documents. In both cases, his conclusion is the same, that is to say it is 'material'.

[102] The objections by the defendant on the expert report are;

(a) the expert is not qualified to give an opinion on whether the inside information is 'material' under s 185 of the CMSA; and

(b) the expert is not entitled to take into account the analysis dated 6 January 2009 ('the OSK analysis') by OSK research ('OSK') and WCT's financial impact announcement to determine the 'materiality' of the inside information.

[103] At the outset it should be explained that there is no reason to reject this expert report. This is because the defendant chose not to rebut this report with his own expert's report. Second even if there is no plaintiff's expert report, this court could and has concluded that the inside information is material having regard to the facts of this case as explained earlier. This court too based on these facts is of the view that on the balance of probabilities the announcement of the cancellation of the project would certainly affect the minds of the public whether to enter the market and trade on the securities. The price of the securities is affected as evidenced through the plaintiff's investigating officer ('IO'). These facts among others, include the date of the cancellation, the dates the defendant traded on the securities, the relationship of the defendant and WCT and the price of the securities adduced through the IO. These have all been adduced independently of the plaintiff's expert's report. The report assists but do not per se becomes the only evidence to be relied by this court. Hence, no matter how strongly this report is objected to, the defendant with respect is flogging a dead horse.

[104] The defendant's objections on the OSK analysis are:

(a) firstly, he contends that the OSK analysis is hearsay evidence ('the hearsay point'); and

(b) secondly, he contends that the OSK analysis and WCT's financial impact announcement only came into existence on 6 January 2009. They are thus post-event information ie information occurring after the announcement of the cancellation notice. This information was not generally available to the public at the time when the impugned disposal

took place and thus cannot be considered in assessing the 'materiality' of the inside information ('the substance point'). A

[105] On the hearsay point, the OSK analysis is not hearsay evidence. It is taken to show the existence of the same and available to the public. It is not to establish the truth of the analysis but to show that it is a material forming part of the expert report. *R v Gassy* [2005] SACS 68 is a case where material downloaded from a firearm website is allowed as evidence despite being from a third party. The court in this case did not consider it to be hearsay as the material was only shown to be available for those who accessed the website and not to establish the truth of the same. The same proposition is decided in the case *PQ v Australian Red Cross Society and Others* [1992] 1 VR 19. B C

[106] In the case *Subramaniam v PP* [1956] 1 MLJ 220 the Privy Council held: D

> Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish by the evidence, not the truth of the statement, but the fact that is was made. The fact that the statement was made, quite apart from this truth, is frequently relevant in considering the mental state and conduct thereafter of the witness or of some other person in whose presence the statement was made. E

[107] The *Subramaniam* principle was applied by Edgar Joseph J (as he then was) in *Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors* [1993] 3 MLJ 352. The learned judge held: F

> ... It is well established that such evidence is not hearsay and is admissible when it is proposed to establish by evidence, not the truth of the statement but the fact that it was made (see *Subramaniam v PP*).
>
> As the Privy Council pointed out in *Subramaniam*'s case, the fact that a statement was made, quite apart from its truth, is frequently relevant in considering the mental state and conduct thereafter of the witness. G

[108] PW12 merely testified what is the impact of the OSK analysis on the general investors and not to say the truth of what is stated in the same. This is allowed based on *Lew Chee Fai Kevin* that states: H

> However, it is important to be clear as to what the expert evidence should pertain. *Lyon & du Plessis* does not refer to expert evidence pertaining to how to interpret market movements, but rather, expert evidence pertaining to whether information would be likely to influence persons who commonly acquire securities. To this end, the learned authors view expert evidence as 'necessary to eliminate speculative, subjective and disparate reasoning by individual members of the jury' (see *Lyon & du Plessis* at p 29). The proper role of expert evidence, therefore, is to assist the court in establishing how a reasonable person, at the time of the alleged insider trade, I

would expect the information to influence a common investor, and not to establish, on hindsight, what actually happened to the market upon the release of the information.

[109] Likewise, in *James Hardie Industries NV v Australian Securities and Investments Commission* [2010] NSWC 332 it is said:

> ... Further, what the trial judge had to determine was the hypothetical reasonable person's prospective assessment as to whether particular information would have a material effect on the price or value of securities. This does not necessitate a quantitative assessment.

[110] Chew Soo Ho J in *Lim Chee Yong & Ors v Lee Boon Su & Ors* [2013] 1 LNS 642:

> However, it must be noted that the role of an expert is to give his opinions and not an account of the actual or true fact on matter that is called for inquiry before the court. There is therefore no requirement that the materials or any texts or reference that an expert referred to must be proved to be true before the expert can form his opinions or conclusion. He is an expert and the final opinions is his irrespective what materials he might have referred to. If all materials etc, referred to are required to be so proved, then the expert will be making a finding of facts and not rendering an expert opinion upon his own knowledge and skill or expertise. There may be situation that an expert can make a finding of facts such as a chemist who analyses substance containing drugs and found after analysis that there is certain quantity of drug a will as the type of drug. Such analysis is a finding of fact. However this does not apply in this instant case where the computation or assessment of the probable revenue or profits is more an opinion basing on various factors that the expert needs to consider in forming his ultimate opinion. It is certainly not a finding of fact which required true facts to be produced. Therefore, there is no necessity to prove the authenticity and the truth of the contents of the material or texts etc referred to by the expert. It would be unacceptable to endorse the defendants' contention and proposition that all author or makers of the materials referred to by an expert must be called to prove the truth of the contents of the materials for the same reason that the final analysis is the opinion of the expert and not those authors.

[111] As stated the OSK analysis should be admissible to show its existence as real evidence and not as evidence of the truth of what is stated therein. In *Victoria Insurance Co Ltd v Aik Teong Trading Co Trading* [1973] 1 MLJ 15 Chang Min Tat J as he then was held:

> The letter exh D18 was clearly admissible and admitted quite rightly, but on the rationale of *Subramaniam*'s case which though a criminal case is a decision on s 60 of the Evidence Ordinance requiring all evidence to be direct evidence, the document was admissible only to prove its existence and receipt but was inadmissible as hearsay evidence when the object was to establish the truth of what was in that statement.

[112] With respect the authorities cited by the defendant, *R v Turner* [1975] 1 All ER 70, *Pacific Tin Consolidated Corporation v Hoon Wee Thim* [1967] 2 MLJ 35 and *Malaysia National Insurance Sdn Bhd v Malaysia Rubber Development Corporation* [1986] 2 MLJ 124 are distinguishable as the experts were asked a specific fact in issue. Hence there is a need for the experts to prove personal knowledge of the facts in these cases. As stated earlier this is different from the present case where the expert is not vouching for the truth of the analysis.

[113] On the substance point, with regard to the materiality issue the plaintiff's expert testified as follows:

> BJD: It was also suggested to you that you have taken into account information beyond 5thof January 2009 in coming to your opinion and you disagreed and again can I ask you to explain why?
>
> PW12: My scope of work is to determine materiality, ok sorry, on my scope of work, the date of materiality, the date of materiality is on when the information becomes generally available. Hence, *I have to consider the total mix of information before that date and after that date in order to assess materiality*. So I mean, the analogy would be, in a post mortem analysis, you are looking at a dead body. But the body is still alive when the person, the act of crime has taken place, if I may have that analogy. *So I have to look at the information exceeding the date, the material date information as well*. (Emphasis added.)

[114] Thus, the expert's position is that he is entitled to look at all relevant information existing both prior to and after the impugned disposal in assessing the 'materiality' of the inside information. Cases have shown that there are several tests to assess 'materiality'. They are as follows:

> In *TSC Industries, Inc v Northway Inc* 426 US 438; 96 SCt 2126, the court had laid down the following test ('the TSC Test') for determining 'materiality' of information under the Securities Exchange Act 1934.
>
> ... there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available.

[115] In *Public Prosecutor v Chua Seng Huat*, our High Court applied the test in *Basic Incorporated v Max L Levinson et al* 485 US 224; 108 SCt 978 to assess 'materiality' under the Securities Industry Act 1983. The test in *Basic Incorporated* also known as the 'the probability/magnitude test' posited that:

> materiality will depend at any given time upon a balancing of both the indicated probability that the event will occur and the anticipated magnitude of the event in light of the totality of the company activity.

[116] In *Lew Chee Fai Kevin* the court recognised that apart from the TSC

test, market impact evidence ie evidence of the actual price movement of securities following the disclosure of the alleged material information, was also relevant, though not conclusive in assessing 'materiality'. It held:

> ... the court in *Bilzerian* was correct to treat Market Impact Evidence as relevant but not conclusive ...

[117] In *Sharbern Holding Inc v Vancouver Airport Centre Ltd* [2011] SCJ No 23, the Supreme Court of Canada adopting the TSC test, developed further considerations in assessing materiality. It held:

> In carrying out a materiality assessment, a court must first look at the information disclosed to investors at the time they made their investment decision. In the present case, what I will refer to as 'disclosed information' was the information contained in the Hilton Disclosure Statement. The next step in determining whether an omitted fact or information (the 'omitted information') would be considered as significantly altering the total mix of information made available is to consider the omitted information against the backdrop of what was disclosed ... As part of this second step, *a court may consider contextual evidence which helps to explain, interpret, or place the omitted information in a broader factual setting*, provided it is viewed in the context of the disclosed information ...
>
> *Another type of evidence relevant to the materiality assessment is evidence of concurrent or subsequent conduct or events that would shed light on potential or actual behaviour of persons in the same or similar situations ('behaviour evidence')*. For example, a plaintiff would not be precluded from introducing evidence, if available, that the defendant acted on a conflict of interest even though that evidence pertained to events arising subsequent to the investors making their investment decisions. Similarly, a defendant would not be precluded from bringing evidence that investors had information not included in the disclosure documents at the time they were making their investment decisions, or that investors who had the information acted in a certain way. Beyond this behaviour evidence, evidence of common knowledge or, depending upon the circumstances, knowledge specific to particular investors would also be admissible ...
>
> *While not part of the total mix, the behaviour evidence of fully informed investors, either prior to making their investment decisions (eg, the Tevan evidence) or subsequent to their investment (eg, the investor committee meetings evidence), when they learned of the guarantee, was also relevant to the trial judge's determination of whether the reasonable investor would have considered the Compensation Differences material.* (Emphasis added.)

[118] Hence it is wrong to argue that 'materiality' is to be assessed based on information only as at the date of the alleged inside trade.

[119] Applying the *Sharbern* test, the court may properly consider 'subsequent behaviour evidence', that is to say, the potential behaviour of the hypothetical reasonable investor (ie persons in the same or similar situation as

the reasonable investor on 30 December 2008) who has alongside with the announcement of the cancellation notice, the OSK analysis (the 'subsequent event') when making his decision to trade on the WCT securities.

[120] The *Sharbern* test clearly recognises that 'materiality' may be determined by looking at post-event information, in this case, information occurring after the date of the cancellation notice.

[121] The OSK analysis can be taken into account because it falls within 'contextual evidence' in the substance point in that it gives an insight to the court as to how the market views the financial impact of the cancellation of the contract on the immediate and future financial performance of WCT, in terms of the projected earnings contraction and the estimated loss of order book.

Whether the expert's supplemental witness statement No 2 is admissible

[122] The defendant has objected to the admissibility of the plaintiff expert's witness statement marked as PW12C. It is contended that the contents of PW12C should be in adduced in the form of a report which complies with the requirements in O 40A r 3(2) of the Rules of Court 2012 ('the RC') and that the said report should in turn be tendered into court by way of an affidavit.

[123] Indeed, there is no basis for the defendant's objection. the expert report dated 9 September 2015 (TAB 70 of Bundle E) complies with the requirements set out in O 40A r 3(1) of the RC. It has also been tendered into court by way of an affidavit. There is the affidavit affirmed by the plaintiff expert on 20 January 2016 at TAB 1 of Bundle F at pp 1–314.

[124] This court agrees that PW12C is merely a clarification and/or an expansion of the plaintiff expert opinion given in the expert report namely what would be his opinion if the OSK analysis is excluded. Hence, there is no need for the expert's further explanation or expansion of his existing opinion to take the form of a new report. Besides it is too late for the defendant to object to PW12C as his counsel had on 10 April 2017 consented to the plaintiff filing the same.

[125] Also, the defendant had not at any material time raised any objections to the plaintiff expert filing a supplemental witness statement despite being given advance notice of the same on 10 April 2017. The defendant's objections to PW12C were only raised for the very first time roughly one and a half months after their receipt of the same ie on 14 August 2017, on the morning of the trial.

Testimony of the IO

[126] The defendant made heavy weather of the plaintiff's IO testimony.

[127] First is the contention that the witness statement of the IO contains opinion and hearsay evidence. This is not true as the evidence of the IO is largely based on documents he had obtained in the investigation. His elaboration in court based on these documents is required to make the plaintiff's case and his statements in open court are supported by these documents. He should not be prevented from giving his understandings as to the relevancy of these documents. The contention that he has no personal knowledge of the documents also cannot be accepted, as being the IO, he has the duty to explain his investigation in respect of these documents. This includes the documents pertaining to the trading pattern of the defendant where he had retained the securities for a long time but suddenly disposed the same in a short four days trading. This is not opinion evidence but is factual evidence based on documents largely undisputed. The IO cannot merely tender these documents without explaining the relevancy of the same. *Keongco Malaysia Sdn Bhd v Ng Seah Hai* [2012] 7 MLJ 288, *Jakara Sdn Bhd v HSBC Bank Malaysia Berhad (formerly known as HongKong Bank Berhad)* [2015] MLJU 1211 and *Southeast Asia Special Asset Management Berhad v L&R Holdings Sdn Bhd & Anor* [2011] MLJU 522 are all authorities for the proposition that documents cannot be simply thrown to the courts without explanation of these documents. Thus, what the IO did is only consistent with the principle laid down in these cases.

[128] The words used by the IO such as 'quite telling and peculiar', 'precision in timing', 'quite remarkable', 'not a mere coincidence' and 'not ordinary sale' are descriptive words and not opinion that he concluded in thin air but because of the investigation done by him and based on documents and statements he recorded. In *Sarkar, The Law of Evidence*, the learned author said the approach that should be taken by courts in respect of opinion evidence is as follows:

> ... the opinions of ordinary persons ie non-experts are irrelevant. It is one of the fundamental rules of the law of Evidence. The impressions and inferences of ordinary witnesses are excluded as superfluous, because the court and jury are quite competent to draw their own conclusions when the facts personally observed by the witnesses are narrated ... The above general rule, however, has exceptions ... They are things, events or circumstances which no language can adequately describe and the best account is from the impressions or opinions which the witnesses formed.

[129] Even if certain statements of the IO are considered as inferences or conclusions of the IO, these are limited in nature and made as a notice to the defendant as to the nature of the case of the plaintiff. The defendant is alerted of the plaintiff's case so as to be prepared for it.

[130] In *Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal* [1995] 2 MLJ 770 the Court of Appeal cited with approval the pronouncement of Mukharji J in *AEG Carapiet v AY Derderian* AIR 1961 Cal 359 where the learned judge said:

> It is a rule of essential justice. It serves to prevent surprise at trial and miscarriage of justice, because *it gives notice to the other side of the actual case that is going to be made* when the turn of the party on whose behalf the cross-examination is being made comes to give and lead by producing witnesses. (Emphasis added.)

[131] The case of *Malaysia National Insurance Sdn Bhd v Malaysia Rubber Development Corporation* [1986] 2 MLJ 124 quoted by the defendant is also distinguishable as in this case the hearsay evidence of the adjustor was based on interviews. The IO's evidence in the present case instead is based largely on unchallenged documents of the defendant's trade reports and banking statements.

[132] Further, the assertion that the plaintiff's IO has given hearsay evidence in respect of the closeness of the relationship between the defendant and the directors of WCT also became irrelevant as the defendant admitted in open court about this and this fact is recorded in court after the admission.

The relief sought

[133] The plaintiffs' claim against the defendant for:

(a) the recovery of the sum of for the sum of RM3,238,760.55 which is equivalent to three times the amount of RM1,079,586.85 being the difference between the price at which the WCT securities were disposed by the defendant via the impugned disposal and the price at which they would have been likely to have been disposed of at the time of the disposal or agreement, if the cancellation of the contract had been generally available pursuant to s 201(6)(a) of the CMSA;

(b) a civil penalty not exceeding RM1m pursuant to s 201(6)(b) of the CMSA; and

(c) an order that the defendant be barred from being a director of any public listed company for a period of five years from the date of this order or for such period as may be determined by this honourable court pursuant to s 360(1)(a)(L) of the CMSA.

[134] This court is of the view that on the balance of probabilities for the reason explained, the case of insider trading has been made out against the

defendant. The lower burden required in this civil action meant that it is much easier for the plaintiff to prove its case and the material facts in this regard have been proven.

[135] Based on the totality of evidence as narrated earlier, the plaintiff has proven that the defendant had indeed contravened the provision of s 188(2)(a) of the CMSA. In this regard this court cannot agree with the defendant to say that the plaintiff is asking for declaration that the defendant had committed a criminal offence. It is quite clear the plaintiff is taking civil action against the defendant. Further the finding that there is contravention of the above provision only is a consequent towards proving the civil action on the balance of probabilities. It is not a *sine quo nan* of the relief claim.

[136] The defendant quoted *Government of Malaysia v Lim Kit Siang* [1988] 2 MLJ 12 and the Australian cases of *Australian Securities and Investments Commission v Intertax Holdings Pty Ltd* [2006] QSC 276, *Australian Securities And Investments Commission v HLP Financial Planning (Aust) Pty and Others* (2007) 245 ALR 29, and *Rooney v ABB Grain Ltd (No 2)* [2011] FCA 231 for the proposition essentially that criminal matters cannot be brought in civil action or civil action cannot be taken when criminal prosecution would be a more appropriate proceeding. All these cases have not been shown to be relevant based on the facts of the present case before this court that indeed allows for civil action to be taken by virtue of s 201(6) of the CMSA as highlighted earlier. These cases quoted by the defendant are therefore distinguishable.

Further s 200(1) of the CMSA states:

> Where it appears to the Commission that any person has contravened section 175, 176, 177, 178, 179 or 181, the Commission may institute civil proceedings in the court against that person, *whether or not that person has been charged with an offence in respect of the contravention, or whether or not a contravention has been proved in a prosecution*. (Emphasis added.)

[137] The above provision underscores the plaintiff's right in instituting a civil action despite there being no criminal prosecution.

[138] This court also cannot agree to the defendant's contention that the plaintiff's had failed to expressly plead that it is bringing this case based on public interest to recover damages and civil penalty, a requirement according to the defendant pursuant to s 201(6) of the CMSA. First, this court is of the view that the plaintiff had commenced this action because of its statutory functions. There can be no doubt that these statutory functions are in the public interest. The public interest element is intrinsic in the action itself. Second, there is in fact evidence from the IO, who testified about the issue of public interest. A

question was put to him why does the plaintiff considers it is in the public interest to pursue the civil claim and this witness answered it accordingly. There was no objection to this question. It is also with respect that the defendant had made a mountain out of molehill to argue that this witness as the investigating officer of the plaintiff does not have the standing to say the action was taken based on public interest. This court cannot agree with this contention as the fact remains that this witness is in the employment of the plaintiff. In court he gave evidence that he is both representing the plaintiff and a witness for the plaintiff. Hence, he has the capacity, right and standing to say the action was taken indeed by the plaintiff based on public interest. Third, the Court of Appeal in *Malayan Banking Bhd v KM Music Lines Sdn Bhd* [2015] 5 MLJ 533 has already stated that the rules of pleadings should not be used to shut out a party from making its case or defence.

[139] The defendant also raised the issue that the plaintiff failed to plead the particulars who had communicated the inside information, how the defendant obtained this and what was the precise communication. This court as already ruled circumstantial evidence can be accepted with regard to the questions raised here. Besides these were the objections for an application filed by the defendant to strike out the plaintiff's action and this application was dismissed by this court much earlier. There was no appeal against this decision. Hence, the matter is res judicata. In any event, what the defendant is requesting amounts to evidence and not particulars and in *Pet Far Eastern (M) Sdn Bhd v Tay Young Huat & Ors* [1999] 5 MLJ 558, it was decided, pleading must contain only statement of material facts and not the evidence by which they are to be proved. The defendant quoted the United States cases of *In Re Wet Seal Inc Securities Litigation* 518 F Supp 2d 1148 and *In Re McKesson HBOC, Inc Securities Litigation* 126 F Supp 2d, 1248 (ND Cal 2000) for the propositions that the precise communication to the defendant and the name of the source of that information must be pleaded. With respect, this court could not agree to these cases as this court has already approved earlier the cases of *Re Azeff* and *Shane Shuman* on the fact that circumstantial evidence can be adduced to find that a party is involved in insider trading. As stated, the circumstantial evidence adduced during trial in the present case indicates the defendant had the inside information.

[140] The defendant too submitted that without the calling of WCT's directors, this meant adverse inference under s 114(g) of the Evidence Act 1950 should be applied against the plaintiff. This court is not minded to find adverse inference should be drawn under this provision against the plaintiff as it cannot be said that there was conscious withholding or suppression of evidence. Further, if a party himself is at liberty to call any witness including by subpoena, adverse inference cannot be levelled against the other party. See *Krishnan Nambiar s/o Perabakaran & Ors v Dr P Mahendran & Anor* [2009] 4

MLJ 267 and *Munusamy v Public Prosecutor* [1987] 1 MLJ 492.

[141] This court is of the opinion that insider trading is a very serious wrong. The action of the defendant not only is unfair to other investors but it can seriously undermine the stock market. It borders on making unlawful gains or avoiding losses unfairly. Part of the relief sought ought to be granted as deterrence to other potential likeminded investors as the defendant. Insider trading erodes public confidence not only among local investors but internationally. A stock market tarnished by insider trading promotes no public confidence.

[142] Pursuant to s 201(6)(a) of the CMSA as narrated earlier, the plaintiff is entitled to recover an amount equal to three times the amount of the loss avoided being the difference between the price at which the WCT securities were disposed of by the insider and the price at which they would have been likely to have been disposed of at the time of the impugned disposal if the inside information had been generally available. This is a statutory formulation of the amount that the defendant is liable to pay.

[143] The detailed computation of the plaintiff's claim for RM3,238,760.55 has been set out by the IO. This amount is allowed and the defendant is ordered to pay this amount to the plaintiff. There is no reason to agree with the defendant's contention that this witness cannot make this computation and this piece of evidence should have been adduced through the plaintiff's expert. The IO is a competent witness in this respect having done the investigation and had explained the price of the disposal of the securities.

[144] The defendant objected to this claim, submitting no evidence adduced to show what would have been the price between 30 December 2008 and 5 January 2009. There is actually no need of this evidence. This is because the statutory provision of s 201(6)(a) of the CMSA only requires the evidence of the difference between the price at which the securities were disposed of by the insider and the price at which they would have been likely to have been disposed of at the time of the disposal if the information had been generally available. And as for the second part of the requirement ie the price at which they would have been likely to have been disposed of at the time of the disposal if the information had been generally available, there are several ways upon which this can be attained. It is not necessary and a must as contended by the defendant that the price on the dates of the impugned disposal ie between 30 December 2008 and 5 January 2009 ought to be determined specifically if the information had been generally available on that dates.

[145] In this regard, first, there is no dispute about the price the securities were disposed by the defendant. Second, there is also no guideline in the CMSA in

determining the price at which the securities would have been likely to have been disposed of at the time of the disposal if the information had been generally available. Third, as will be shown, the courts have applied various methods by which damages for a breach of insider trading laws may be calculated.

[146] The plaintiff's calculation of damages under s 201(6)(a) of the CMSA is set out by the IO based on the following:

(Total Net Proceeds of the Impugned Disposal)	–	(Total Volume Traded x Closing Price at 7 January 2009)

[147] The plaintiff had utilised the closing price of WCT securities on 7 January 2009 to reflect the price WCT securities would have been likely to have been disposed of at the time of the impugned disposal, if the cancellation of the contract had been generally available on that date.

[148] PW3 had explained the basis for utilising WCT's closing price of 7 January 2009 as follows:

> Trading on WCT Securities was halted at 9.12 a.m. on 6.1.2009. As such, the true measure of the impact of the Cancellation of the Contract on the price and value of the WCT Securities could not be determined on 6.1.2009. Therefore, for the purposes of the present case, SC has taken the closing price of WCT Securities of 7.1.2009 after a full day of trading had taken place ...

[149] There is nothing wrong with the approach taken by the IO as indicated above. In taking note of the closing price of WCT securities on 7 January 2009, this court is also in agreement that the IO is correct and consistent with the decided cases on point as shown by the plaintiff's submissions below.

The 'out of pocket' approach

[150] In *Elkind v Liggett & Myers Inc* 635 F2d 156 1980, the United States Supreme Court had set out the various approaches to determining the sum that would be recoverable by the uninformed trader from the tipper and tippee trader. Mansfield J held at p 15:

> First, there is the traditional *out-of-pocket measure* used by the district court in this case ... *The 'value' of the stock traded during the period of non disclosure of the tipped information (ie, the price at which the market would have valued the stock if there had been a disclosure) is hypothetical. Expert testimony regarding that 'value' may, as the district court found in the present case, be entirely speculative. This has led some courts to conclude that the drop in price of the stock after actual disclosure and after allowing a period of time to elapse for the market to absorb the news may sometimes approximate the drop which would have occurred earlier had the tip been disclosed.* See *Harris v American Investment Company*, 523 F2d 220, 227 (8th Cir 1975), cert denied, 423

A US 1054, 96 SCt 784, 46 LEd2d 643 (1976). The court below adopted this approach of using post-public disclosure market price as nunc pro tunc evidence of the 'value' of the stock during the period of non-disclosure.

B At p 16:

It rests on the fundamental assumptions (1) that the tipped information is substantially the same as that later disclosed publicly, and (2) that one can determine how the market would have reacted to the public release of the tipped information at an earlier time by its reaction to that information at a later, proximate time. This theory depends on the
C *parity of the 'tip' and the 'disclosure'. When they differ, the basis of the damage calculation evaporates.*

An alternative measure would be to permit recovery of damages caused by erosion of the market price of the security that is traceable to the tippee's wrongful trading, ie, to compensate the uninformed investor for the loss in market value that he
D suffered as a direct result of the tippee's conduct. (This approach was referred to by the Court as *'the causation fact approach*').

At p 17:

E The third alternative is (1) to allow any uninformed investor, —

where a reasonable investor would either have delayed his purchase or not purchased at all if he had had the benefit of the tipped information, to recover any post-purchase decline in market value of his shares up to a reasonable time after he learns of the tipped information or after there is a public disclosure of it but (2) limit
F his recovery to the amount gained by the tippee as a result of his selling at the earlier date rather than delaying his sale until the parties could trade on an equal informational basis ... *This third alternative ... may be described as the disgorgement measure* ... (Emphasis added.)

G **[151]** What can be distilled from the various approaches set out in *Elkind* is that:

(a) the 'out-of-pocket' approach is similar to the statutory formula set out in s 201(6)(a) of the CMSA in that it recognises that damages for insider trades may be assessed by ascertaining the price at which the market
H would have valued the security, had the relevant information been publicly disclosed then; and

(b) under the 'out of pocket' approach, it is appropriate to use the market price of the security after public disclosure as *nunc pro tunc* ('now for
I then') evidence of the value of the stock had the information been disclosed, if two assumptions ('the *Elkind* assumptions') are established:

(i) the tip/inside information is substantially the same as the information that is later publicly disclosed ie there is parity between the 'tip' and 'publicly disclosed information' ('the parity consideration'); and

(ii) one can determine how the market would have reacted to the public release of the tipped information at an earlier time by its reaction to that information at a later, proximate time ('the proximity of time consideration').

Utilisation of the market price of security after public disclosure

[152] Judicial decisions have recognised that the market price of a security after public disclosure of the relevant material information, can represent the 'true' value of the security, for purposes of assessing damages for insider trading or fraudulent market activities.

[153] In *Securities And Exchange Commission v Ratilal K Patel* 61 F3d 137, the United States Court of Appeals held:

> *We have held that, where stock is purchased on the basis of inside information, the proper measure of damages is the difference between the price paid for shares at the time of purchase and the price of the shares shortly after the disclosure of the inside information. SEC v Texas Gulf Sulphur Co*, 446 F2d 1301, 1308 (2d Cir), cert denied, 404 US 1005, 92 SCt 562, 30 LEd2d 558 (1971). In that case, we recognized that disgorgement of profits merely deprives the wrongdoers of the gains of their wrongful conduct. It therefore seems necessary to examine the movement of a stock's price after the relevant information is made public in order to determine the proper measure of the illicit profit (or loss avoided) to be charged to one who traded illegally while in possession of the material, non-public information ... (Emphasis added.)

[154] In *Harris v American Investment Company* 523 F2d 220 (1975) the United States Court of Appeal held:

> ... we believe that under the allegations made in the instant case *the public discovery of the fraud may be the proper date at which to ascertain damages*. The circumstances may disclose that only then did the market reflect the true value of the stock, unaffected by what is alleged to have been the defendants' continuing fraud:
>
> > *Value is determined by their (ie, the securities') market price after the fraud is discovered when the price ceases to be fictitious and represents the consensus of buying and selling opinion of the value of the securities as they actually are* ... (Emphasis added.)

[155] In *Securities And Exchange Commission v James E MacDonald Jr* 699 F2d 47, the United States Court of Appeals held:

> The inside information in the case at bar is considerably less spectacular than that in Texas Gulf, and, accordingly, the reasonable period for the general dissemination, and then, digestion, of the December 24 press release could be expected to be longer than the one day period deemed sufficient there. *Since, in the present case, there is no*

evidence of other material events during the period in question, the market itself may be the best indicator of how long it took for the investing public to learn of, and react to, the disclosed facts. The natural effect of public disclosure would be to increase the demand for, and correspondingly, the price of, RIT stock, and once investors stopped reacting to the good news, the price could be expected temporarily to level off. *Therefore, upon remand, in determining what was a reasonable time after the inside information had been generally disseminated, the court should consider the volume and price at which RIT shares were traded following disclosure, insofar as they suggested the date by which the news had been fully digested and acted upon by investors.* (Emphasis added.)

[156] On the facts of the present case, the *Elkind* assumptions have been satisfied in that:

Parity consideration

There is complete parity between the tip/inside information possessed by the defendant and the information that was publicly announced by WCT on 6 January 2009 at 9.02am. Both were in respect of the cancellation of the contract; and

Proximity of time consideration

There are only four trading days between the commencement of the impugned disposal on 30 December 2008 and when the cancellation of the contract was publicly disclosed on 6 January 2009. There is close proximity between these two sets of dates and no evidence of any supervening event within the same period.

[157] As the plaintiff had satisfied the *Elkind* assumptions and bearing in mind that trading in WCT securities had been halted on 6 January 2009 at 9.02am ie immediately upon the public announcement of the cancellation of the contract to Bursa Malaysia, the plaintiff is entitled to utilise the closing price of WCT securities on 7 January 2009 to compute the monetary relief under s 201(6)(a) of the CMSA.

[158] Further, the closing price on 7 January 2009 represents a reasonable period for the cancellation of the contract to have been fully disseminated to and assimilated by the public pursuant to s 184 of the CMSA and is thus a proper measure of the impact of the cancellation of the contract on the price and value of WCT securities for the purposes of s 201(6)(a) of the CMSA.

The market conditions on the date of the impugned disposal and the date of the public announcement need not be identical

[159] The Irish Supreme Court in *Fyffes plc v DCC plc* [2007] IESC 36 had rejected Laffoy J's pronouncement in the High Court that the market conditions on the date of the insider trades and the date of the public release of the information must be identical.

[160] Denham J held at p 712 of *Fyffes,* that it was sufficient that there were 'no significant differences' between the markets on these two competing dates and that any difference if it existed, would affect the weight to be given to the evidence but would not exclude the evidence. Macken J similarly held that what was required was only 'sufficient and appropriate similarity' between the two market conditions. His detailed reasoning is set out in p 754 of *Fyffes*:

> As to the second of the ingredients in the 'proxy' test proposed by the Defendants and applied by the learned High Court judge, I confess to finding it difficult to concur with her finding that the market conditions, not being identical, suffised to exclude any consideration of the market reaction after the 20th March. Although radically different market conditions might well lead to a different result, *it would be next to impossible to find, on any two dates, even those quite close together, absolutely identical market conditions, save in fortuitous or highly exceptional circumstances. The test to be applied therefore cannot be based on a requirement that in all circumstances the market conditions must be identical. Provided that there is sufficient and appropriate similarity between the market conditions, the condition of the market after the release of the March 20 Trading Statement was not such as to justify the total rejection of the subsequent immediate and significant fall in share price.* (Emphasis added.)

[161] The plaintiff had adduced evidence to show that there was no difference between the market conditions existing on the dates of the impugned disposal ie on 31 December 2008, 31 December 2008, 2 January 2009 and 5 January 2009 and the market conditions on 6 January 2009, when the cancellation of the contract was publicly disclosed.

[162] PW12 had testified that his assessment of the 'materiality' of the inside information on 6 January 2009 would still be applicable on the dates of the impugned disposal as, save for the cancellation of the contract, there was no other relevant or confounding information within ten trading days prior to the 6 January 2009. This is what PW12 said in his witness statement in PW12C:

> Q: Can you explain to this Honourable Court whether your opinion in the Report on the materiality of the Information would be applicable to the alleged insider trades that occurred on 30.12.2008, 31.12.2008, 1.2009 and 5.1.2009.
>
> A: In preparing the Report, I am aware that in all insider trading cases the alleged insider trading activity would have occurred prior to the 'inside information' becoming generally available. Based on my internet searches and analysis of the

A trading of the WCT securities via the stock-price and volume chart, there are no other relevant material or confounding information within 10 trading days prior to the 6.1.2009 that would alter my conclusions.

B **[163]** PW12's evidence on this issue was never challenged by the defendant.

It is sufficient for the plaintiff to show a reasonable approximation of profit or loss avoided. The burden is then sifted on the defendant to prove otherwise.

C **[164]** The courts have recognised that predicting stock market responses is not a matter of exact determination but a speculative exercise. In keeping with this assessment, the courts have stated that the disgorgement of insider trading gains need only be a 'reasonable approximation' of the profit/loss avoided causally connected to the violation.

D **[165]** Once the plaintiff had provided a 'reasonable approximation' of the loss avoided by the insider trade, the burden shifts on the defendant to demonstrate that the amount claimed is not a 'reasonable approximation' of the same.

E **[166]** The aforesaid principles were articulated by Silberman J in the United States Court of Appeals in *Securities and Exchange Commission v First City Financial Corp Ltd* 890 F2d 1215 (1989) where he held:

> If exact information were obtainable at negligible cost, we would not hesitate to impose upon the government a strict burden to produce that data to measure the
F precise amount of the ill-gotten gains. Unfortunately, we encounter imprecision and imperfect information. *Despite sophisticated econometric modelling, predicting stock market responses to alternative variables is, as the district court found, at best speculative. Rules for calculating disgorgement must recognize that separating legal from illegal profits exactly may at times be a near-impossible task*. See, eg, *Elkind v Liggett &*
G *Myers, Inc*, 635 F2d 156, 171 (2d Cir 1980).
>
> *Accordingly, disgorgement need only be a reasonable approximation of profits causally connected to the violation.* In the insider trading context, courts typically require the violator to return all profits made on the illegal trades, see, eg, *SEC v Texas Gulf Sulphur Co*, 446 F2d 1301, 1307 (2d Cir), cert. denied, 404 US 1005, 92 S Ct 561,
H 30 LEd 2d 558 (1971), and have rejected calls to restrict the disgorgement to the precise impact of the illegal trading on the market price ... (Emphasis added.)

And later:

I > Although the SEC bears the ultimate burden of persuasion that its disgorgement figure reasonably approximates the amount of unjust enrichment, *we believe the government's showing of appellants' actual profits on the tainted transactions at least presumptively satisfied that burden. Appellants, to whom the burden of going forward shifted, were then obliged clearly to demonstrate that the disgorgement figure was not a reasonable approximation. Defendants in such cases may make such a showing, for*

instance, by pointing to intervening events from the time of the violation. (Emphasis added.)

Uncertainty over the profit/loss avoided is to be resolved against the defendant

[167] The courts have further recognised that all doubts or uncertainty concerning the approximation of the profit or loss caused by the insider trading/fraudulent market activities are to be resolved against the defendant. In *SEC* Silberman J held at p 18:

> Placing the burden on the defendants of rebutting the SEC's showing of actual profits, we recognize, may result, as it has in the insider trader context, in actual profits becoming the typical disgorgement measure. But the line between restitution and penalty is unfortunately blurred, and *the risk of uncertainty should fall on the wrongdoer whose illegal conduct created that uncertainty.* (Emphasis added.)

[168] In *Ratilal K Patel*, Miner J affirmed the dicta in *SEC* and said:

> We think that the district court's calculation of avoided losses was appropriate and reasonable in all respects and not an abuse of discretion. See *SEC v Posner*, 16 F3d 520, 522 (2d Cir 1994), cert denied, US 115 S Ct 724, 130 LEd2d 629 (1995). *While calculations of this nature are not capable of exactitude, we agree with the District of Columbia Circuit that any 'risk of uncertainty [in calculating disgorgement] should fall on the wrongdoer whose illegal conduct created that uncertainty.* (Emphasis added.)

[169] Based on the aforesaid authorities, the closing price of WCT's securities on 7 January 2009 correctly represents the value of the WCT's securities on the date of the impugned disposal had the inside information been generally available then and the sum of RM1,079,587 is a 'reasonable approximation' of the loss avoided by the defendant due to his insider trades.

[170] As the plaintiff is statutorily entitled to claim three times the said amount, the plaintiff's total claim under s 201(6)(a) of the CMSA is RM3,238,761 (RM1,079,587 x 3).

[171] Pursuant to the same, the burden shifts to the defendant to demonstrate that the amount claimed by the plaintiff is not a 'reasonable approximation' of the loss avoided.

[172] The defendant had not at any time challenged the plaintiff's computation of the pecuniary relief claimed under s 201(6)(a) of the CMSA. The defendant's dispute to the same was only raised for the very first time in the defendant's written submission dated 9 November 2017 following the conclusion of the trial. It is too late for the defendant to do so and the defendant's objections ought to be rejected.

A The application of the *Elkind* assumptions in *Fyffes*

[173] This court agrees that the *Elkind* assumptions were referred to in *Fyffes* albeit for a different purpose.

B **[174]** In that case, Laffoy J in the High Court had applied the *Elkind* assumption to determine when a post-market event may be utilised to assess the 'price sensitivity' or 'materiality' of an information.

C **[175]** The defendant has relied upon Laffoy J's interpretation of the *Elkind* assumption and his judgment is set out in para 64 of the defendant's written submission dated 9 November 2017. In reliance of Laffoy J's interpretation in the High Court judgment, the defendant had contended:

D (a) the information must be substantially the same as the information subsequently released; and

(b) the market conditions on the date of the alleged unlawful dealing must be identical with the market conditions on the date of release.

E **[176]** The decision of Laffoy J in *Fyffes* was appealed to the Supreme Court. It was heard by a panel of five judges, Denham J, Geoghegan J, Macken J, Fennely J and Finnegan J. The Supreme Court had rejected Laffoy J's interpretation of the *Elkind* assumptions.

F **[177]** In respect of the parity consideration, the Supreme Court held the correct test is 'sufficient similarity' or 'functional equivalence'. See:

(a) the decision of Denham J at p 712 at para 85; and

G (b) the decision of Macken J at p 752 at para 257.

[178] In respect of the proximity of time consideration, the Supreme Court held that market conditions need not be identical but have 'sufficient and appropriate similarity'. See:

H (a) the decision of Denham J at p 712 at para 85; and

(b) the decision of Macken J at p 754 at para 263.

[179] As for the remaining three Supreme Court judges in *Fyffes:*

I (a) Geoghegan J agreed with the judgment of Denham J. He did not give any grounds for his decision (see p 716 at para 109);

(b) Fennelly J held that Laffoy J's dicta on this issue was 'extraordinarily rigid' and refused to apply the same (see p 738 at paras 206–207; and

(c) Finnegan J held (at pp 777–778 at paras 316–317) that the *Elkind* assumptions were not relevant to the determination in *Fyffes* as the *Elkind* assumptions relates to the assessment of damages whereas *Fyffes* was concerned with the evidential value of a post disclosure market event in determining materiality.

[180] Thus, the two contentions of the defendants are with respect incorrect.

[181] As for civil penalty against the defendant, the purpose of pecuniary reliefs in insider trading cases was extensively discussed in *Australian Securities and Investments Commission v Hochtief Aktiengesellschaft* [2016] FCA 1489. The court held as follows:

> It should also be noted in this context that, when sentencing offenders for the criminal offence of insider trading, sentencing judges and courts of criminal appeal have consistently emphasised the importance of general deterrence as a sentencing consideration. That is not only because insider trading is difficult to detect and investigate, but also because there is a need to protect the integrity and efficacy of the market: *R v Fysh (No 4)* (2012) 92 ACSR 116; [2012] NSWSC 1587 at [11], [12]; *R v Rivkin* (2003) 198 ALR 400; 45 ACSR 366; 21 ACLC 1092; [2003] NSWSC 447 at [44] (*R v Rivkin* (2003)); Doff at [56]. *There is no reason to doubt that this reasoning applies equally to the fixing a penalty for a civil contravention of the insider trading provisions*. (Emphasis added.)

[182] In the present case, this court agrees to the plaintiff's submission and considers the matters below to impose civil penalty:

(a) the cancellation notice is of such a nature that a reasonable investor would expect it, upon becoming generally available to have a material effect on price and value of WCT's securities;

(b) the defendant was fully aware at the date of the impugned disposal that the cancellation notice was not generally available;

(c) the defendant being a former director of public listed company ought to be fully cognizant of the rules against insider trading. Indeed, during cross-examination, the defendant had admitted to knowing the confidential nature of a price sensitive information;

(d) the timing and peculiar characteristic of the impugned disposal shows that the defendant had committed a deliberate act of insider trading;

(e) the defendant has shown no remorse or contrition for is actions. Nor has the defendant rendered assistance to the plaintiff, being the regulators of the capital markets. and

(f) the defendant has not made any financial reparations whatsoever in respect of his wrongdoing, from which he has substantially benefitted to

the tune of RM1,079,586.85.

Based on the above factors, the appropriate civil penalty under s 201(6) of the CMSA should be RM500,000. There is no reason to impose the maximum penalty of RM1m as the plaintiff is already allowed the sum RM3,238,760.55 as explained earlier.

[183] Section 360(1)(a)(L) of the CMSA reads as follows:

> Where —
>
> (a) on an application by the Commission, it appears to the court that —
>
> (i) there is reasonable likelihood that any person will contravene a relevant requirement;
>
> (ii) any person has contravened a relevant requirement; or
>
> (iii) *any person has contravened a relevant requirement and that there are steps which could be taken to remedy the contravention or to mitigate the effect of such contravention, including making restitution to any other person aggrieved by such contravention, whether or not that person has been charged with an offence in respect of the contravention or whether or not a contravention has been proved in a prosecution;*
>
> the court may, without prejudice to any order it would be entitled to make otherwise than pursuant to this section, make one or more of the following orders:
>
> ...
>
> (L) in a case where the person is a chief executive or director, an order removing him from office or that he be barred from becoming a chief executive, director or be involved in the management directly or indirectly, of any other public company for such period of time as may be determined by the court ...

[184] Taking note of the above provision, the defendant presently is not the chief executive or director of WCT. Hence the above provision cannot apply against him. It follows, that an order to bar the defendant from being a director of any public listed company for a period of five years from the date of this order or for such period, as requested by the plaintiff cannot be allowed.

CONCLUSION

[185] Legally the plaintiff is permitted to initiate civil action against the defendant and circumstantial evidence can be adduced to find the defendant is liable for insider trading. The civil action only requires the case to be proven on the balance of probabilities.

[186] The facts narrated have shown on the balance of probabilities the defendant did dispose the securities wrongly only because he had the relevant information unavailable to the general public.

[187] Therefore, he should be made liable to pay thrice the amount he had obtained from the disposal of the securities. Statutorily he should also be liable to pay the civil penalty.

Order accordingly.

Reported by Afiq Mohammad